State Practice of India Series

INDIA AND INTERNATIONAL LAW

State Practice of India Series

Volume I	India and International Law—From Earliest Times to 1947
Part A	Ancient & Mediaeval India—up to 1707 A.D.
Part B	Pre-Independence India—1707-1947 (In preparation)
Volume II	India and International Law—State Practice of India 1947-1957 (In preparation)
Volume III	India and International Law—State Practice of India 1958-1968 (In print)
Volume IV	India and International Law—State Practice of India 1969-1974

STATE PRACTICE OF INDIA SERIES

INDIA
AND
INTERNATIONAL LAW

VOLUME I

PART A

ANCIENT AND MEDIAEVAL

NAGENDRA SINGH

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PREFACE

It was in January 1959 that the late Prime Minister Pandit Jawaharlal Nehru graciously permitted me, while in the service of the Government of India, to publish a series on the *'State Practice of India in the Field of International Law.'* This was accordingly undertaken under the auspices of the Indian School of International Studies and the scheme was blessed by the Head of the Organisation, Pandit H. N. Kunzru, who had himself written a letter to Prime Minister Nehru seeking his permission for bringing out this series and also asking me to undertake this work as a Visiting Professor of the School in an honorary capacity. As the state practice of any country in the field of international law is the outcome of the functioning of governmental authority inasmuch as statements made by high officials of Government representing the state, both in and outside the country, are taken legal cognizance of to determine the state practice, I consider it a great good fortune that from the very beginning Government blessings were unequivocally forthcoming for the preparation and publication of this series. In fact, the Minister of Transport Shri Raj Bahadur under whom I was then directly working and whose permission was also essential for my participation in this series, went a step further in observing that "it was the function today of distinguished jurists of the countries of the world community to bring out the state practice of their respective countries as that would not only add to the existing information on legal attitudes of governments in matters of international importance but would constitute a new source of international law." The aforesaid observation was very much in conformity with the views expressed on December 12, 1959, by Lord McNair, one time President of the International Court of Justice, when he wrote to me in response to my query that the publication of this series "would be found to be a very useful addition to the apparatus of international law,

I wish it could be done in many countries because it contains precisely the material which any stranger has so much difficulty in finding." The *raison d'etre* of this publication is, therefore, obvious. It is to make readily available all useful material which would throw light on the state policy and practice of India in the field of legal regulation of inter-state relations. The statements made by representatives of nations at international organisations, public pronouncements of high level representatives of Governments of countries abroad such as heads of missions, and statements made by Ministers or other members of governments before their national legislatures or on public occasions concerning events of international importance which have a legal aspect, will always remain of great interest to the student of international law. In this connection, there is no doubt that proper care has to be taken to distinguish the official statements of policy from the utterances of those who are not representatives of Government in the sense that they are not in a position to bind their country. In this connection, attention is invited to what Sir Gerald Fitz-Maurice stated during the debate in the First Committee of the Law of the Sea Conference: "To quote from *obiter dicta* of judges and unofficial utterances of Members of Parliament accounted for nothing, for it was the official policy of a country alone which determined its attitude."*

It has, therefore, been necessary to select appropriate, authentic, and fully authoritative sources for the compilation of this series. It may perhaps be worthwhile mentioning here that the material used in this survey has been collected from the following sources:

(a) All official documents published by the Government of India including International Agreements signed during the period.

(b) *Foreign Affairs Record*, a monthly publication of the Ministry of External Affairs, press releases and other sources of information furnished by the Publicity Division of the Ministry of External Affairs, Government of India, New Delhi.

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* UN Conference on Law of Sea, Official Records, Geneva, 1958, III, 136.

(c) Authentic records of debates in the Lok Sabha (House of People) and the Rajya Sabha (Council of States) issued by the Parliament Secretariat. This includes municipal legislation having an international law aspect.

(d) Authentic records and documents of international organisations including the United Nations, the proceedings and summary records issued by the United Nations Secretariat.

(e) Judicial decisions of the Supreme Court of India and the High Courts in India reported in the *All India Reporter* (Nagpur) having an international law aspect.

The aforesaid sources have been the basis for the preparation of all volumes of this series except Volume I which is essentially historical aiming at tracing the evolution of international concepts in the history of our country. The sources for Volume I are, therefore, obviously different and have been mentioned by way of bibliography which will be found at the end of each Part of Volume I.

In regard to the utility of this series, it may be worthwhile pointing out that this is essentially an effort to produce an exhaustive reference book on the subject and hence its value is very much dependent on the compilation of a proper index. Thus at the end of each volume, an index has been given and an effort has been made to make it as exhaustive as possible since it furnishes both the basis and the method for the effective use of this series.

In view of what has been stated above, the true state practice of India in the field of international law could only commence from the day of the independence of the country, namely, from 15th August, 1947 onwards. The period prior to 1947 becomes of historical importance because India under British rule could not be said to have a state practice of its own. It could at best be the state practice of His Majesty's government in the dominions, colonies and possessions overseas. Nevertheless, the period prior to 1947 is not without signi-

ficance. This is particularly so because the Indian sub-continent comprised of several indigenous sovereign states with the necessary machinery of governance both in the ancient period and in the middle ages. With the disintegration of the Moghul Empire consequent upon the death of Emperor Aurangzeb in 1707 A.D. the position changed inasmuch as there was no central authority at Delhi but there were several large and small sovereign states conducting inter-state intercourse and adhering to some recognised legal regulation. In the circumstances, it becomes necessary to trace the evolution of the concepts of international law throughout the course of Indian history. An attempt has, therefore, been made to trace the state practice of India right from the earliest times to the present day. As it would be impracticable to bring out the historical aspect along with the current state practice in one single volume, it has been found necessary to divide the series into several volumes which could be published one by one whenever ready. It may, therefore, be necessary to state here the broad scheme of this project and to indicate how the period from the earliest times to the present day is intended to be covered by this series.

The first volume of this series which is now published covers the period from the earliest times to 1947. This volume is divided into two Parts dealing respectively with the Ancient, and the Mediaeval periods in Part A and the British period of Indian history in Part B. Throughout this long drawn out period of Indian history there were in existence several states having almost all the attributes of sovereignty and conducting their inter-state intercourse on a manifold basis which gave rise to the regulatory aspect and consequently to the birth of inter-state or international law. These sovereign states existed not only within the broad geographical sub-continent of India but were also found flourishing in the neighbouring regions covering large parts of Central Asia which were in constant intercourse with the Indian sub-continent.

Another distinguishing characteristic of the development of international concepts in Indian history has been the fascinating phenomenon of the interaction of different civilizations and cultures and the evolution of common standards. For example,

while inter-state conduct among the states of Aryavarta in Ancient India was governed by the laws of *Dharmasastra* and the Code of Manu, the same cannot be said of Mediaeval India when the contact with Islam brought Islamic laws into play demanding evolution of a common standard for regulating inter-state practice. These states governed by different systems of law came into contact and raised the problem of which law was to apply in a particular case. This was noticeable in all spheres of inter-state activity whether it was the sending of envoys or the application of the laws of war and the treatment of prisoners and the sick and wounded.

A further point in the same direction, of deep interest to the student of international law, was the lodgement of the European settlements in India during the Albuquerque age at the advent of what is known as the Voyages of Discovery and the ushering in of the modern period of world history. The European settlements, namely, French, Portuguese, Danish and the British, soon came into conflict or got closeted in close alliance both *inter se* and in relation to ancient kingdoms and principalities whether Islamic or Aryan. This interaction of different laws of three different civilizations witnessed in the sub-continent of India from 8th century onwards provides a thrilling experience to the student of international law and remains a distinguishing characteristic of this study in the evolution of international law concepts. It is indeed a unique chapter in the history of the world not only fascinating but illustrative of the lessons that can be learnt in the formation of composite civilization of which India is proud and the regulation of inter-state conduct on a basis of standards accepted on consent quite often given by compulsion of events governed by the principle of reciprocity.

As this preface is meant to cover the entire Series on State Practice of India in the Field of International Law and not merely Volume I which follows, a brief mention of what is visualised in the succeeding volumes may be made here.

The intention is to cover a period of ten years following the independence of the country in 1947 in Volume II of this Series. There is no doubt that the period 1947-1957 was at

once momentous in our history when India had a dynamic Prime Minister who was also the Foreign Minister of the land.

During this period, the foundations of the state practice of independent India were firmly laid and keen interest was taken in developing external relations by opening over 50 missions abroad and receiving more than 50 in New Delhi. In one sense, therefore, Volume II is the most important one of the Series particularly from the viewpoint of development of the state practice of modern India.

The period of the decade following 1958 is covered by Volume III which covers the state practice right up to 1968. This is the period when state practice seems to crystallise on the basis of the principles enunciated in the first decade after independence which, as stated earlier, is covered by Volume II. The state practice of India in Volume III has been dealt with from year to year in the form of articles published in *International Studies*, the journal of the Indian School of International Studies. Thus the Third Volume may give the impression of presenting a picture somewhat piecemeal particularly because the earlier Volume II, dealing with the entire 10-year period from 1947 to 1957, has the advantage of being compiled at one time. This, however, is no disadvantage since from the viewpoint of chronological reference, Volume III has a merit of its own. I am glad to state that Volume III (1958-68) is almost ready for publication and will soon see the light of day. The same cannot be said of Volume II which is still under preparation and will take some time to be published.

After 1968, it is the intention to bring out supplementaries from year to year and to have these annual supplements bound into Volume IV after 5 years covering the period 1969 to 1974 if the material collected justifies the publication of a volume at that stage. On the other hand, if the material is scanty, the intention is to wait till a decade which is the present basis of the pattern of this series and bring out Volume IV covering the period 1969 to 1979 at a later date. However, the annual supplements dealing with the state practice of India from year to year will be published regularly under the auspices of the Indian School of International Studies which has now become a part of Jawahar-

lal Nehru University. It may be mentioned specifically, therefore, that this series is now being published under the auspices of Jawaharlal Nehru University because the Indian School of International Studies now forms an integral part of the said University since 5th June 1970. The author has had the great privilege of being associated with this project first as a Visiting Professor of the School to which he was appointed in 1959 and later has continued to function in that capacity after the merger of the School with Jawaharlal Nehru University.

In the publication of this series, I would like to mention that whereas Volume I has been my exclusive and entire responsibility, I have had the pleasure and advantage of being so kindly assisted by Scholars and Professors for Volumes II and III.

As far as Volume III is concerned, there have been a number of co-authors. Thus, for example, for the years 1958 to 1962, Dr. Nawaz has given me valuable assistance for which I have accepted him as co-author for that period. This series started with our joint effort in 1959 and Dr. Nawaz has throughout taken a keen interest in this publication. In regard to the state practice for the years 1963 and 1964, I have had the assistance of Mr. P. Sreenivasa Rao and for 1965, Professor R.P. Anand, Head of the Department of International Law in the Indian School of International Studies, has given me valuable assistance for which I have recognised them as co-authors. As for the period 1966 to 1968, Professor S.K. Agrawala of the University of Poona has been most kind in giving me assistance and I have accepted him as co-author. I would like to place on record my deep sense of gratitude to these co-authors for the great assistance they gave me in the collection of material without which Volume III could not have been published.

I am also deeply indebted to Pandit H.N. Kunzru, Dr. A. Appadorai and Dr. S. Rajan of the Indian School of International Studies for all the encouragement they have given to the publication of this series. I need hardly reiterate that the great octogenarian Pandit H.N. Kunzru, the Founder of the School of International Studies, has also been the founder of this Series and all praise be to him. After the merger of the School with

Jawaharlal Nehru University, I have been most fortunate in getting invaluable guidance and continued encouragement from Shri G. Parthasarathy, Vice-Chancellor of the University.

New Delhi. NAGENDRA SINGH

CONTENTS

ANCIENT INDIA

Ancient India

CHAPTER I

INTRODUCTORY

THE DEVELOPMENT OF THE CONCEPT OF THE LAW OF NATIONS IN ANCIENT INDIA

BASIS OF THE LAW REGULATING INTER-STATE CONDUCT IN ANCIENT INDIA

Though common consent of the community of nations given expressly in a treaty or tacitly in a custom is the basis of international law today,[1] it would appear that in ancient India, the mere fact of incorporation of a rule in the *Srutis* and the *Smrtis* furnished the basis as well as the sanction for the law which was destined to regulate inter-state conduct. For example, stipulations in regard to who could or could not be killed in war as laid down in *Manava Dharmasastra* were treated as law not on the basis of common consent—essentially a modern concept—but on account of the fact that they were enjoined by the laws of *dharma* and had therefore to be obeyed.

Again, if the factor of consent always furnishes the basis of law when treaties are signed, it may be mentioned that *sandhis* or treaties in ancient India were essentially "particular" in character inasmuch as they guided conduct of two and very rarely more participating states and related to a settlement of a topic affecting those states and never laid down universal international law which again is a feature of modern society. All treaties and agreements in ancient India were

1. Oppenheim *International Law,* Vol. I, 7th Edition (1948), p. 16.

contractual by nature since a law-making treaty or "*traite lois*" were more or less unknown in that age. Thus if consent did furnish the basis of treaty law, the latter was of very limited importance as a source of general law in ancient India.

Moreover, if general consent of the community has always been the basis of every kind of customary law, it may be added that ancient India was perhaps no exception to this rule. However, customary law as such may be difficult to locate. It appears that the earlier development of law which may have been customary got generally recorded and codified in the written text of *Smrti* law leaving no clear record of separate customary principles as such. Nevertheless, to the extent that customary law did exist, there can be little doubt that, in actual practice atleast, consent lay at the root both of its evolution and development as well as its ultimate sanction. However, in strict theory, that could not be accepted as the correct position, the reason being that by virtue of a fiction, *Achars* or customs are supposed to be based on lost or forgotten *Sruti* and by some writers on lost or forgotten *Smrti*. That being so, the basis of inter-state law as of any other law in ancient India was ultimately traceable to the revelation of the 'Divine Word' either heard in *Srutis* or remembered in *Smrtis* by the law-givers and if the element of consent did enter at any stage it was very remotely so, if at all, and could not possibly furnish the basis of inter-state law.

Again, an important concept of Hindu Law has been the recognition given to the principle of justice, equity and good conscience which finds a due place in Yajnavalkya's Code wherein it is laid down that "the *Sruti*, the *Smrti*, the approved usage, what is agreeable to one's soul or good conscience and has sprung from due deliberation, are ordained the foundation of *dharma* (Law)."[2] Thus, anything sanctioned by justice, equity and good conscience constituted a basis of law for the governance of the state both in regard to its internal conduct as well as in respect of its external relations.

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2 *Yajnavalkya*, I. 7.

श्रुतिः स्मृतिः सदाचारः स्वस्यच प्रियमात्मनः ।
सम्यक्संङ्कल्पजः कामो धर्ममूलमिदं स्मृतम् ॥

Thus if consent had no *locus standi* in relation to the basis of inter-state law in ancient history, it was the sanctity of the written text provided by *Srutis* and *Smrtis* which was to provide the corner-stone of the legal edifice of the age whether criminal or civil, municipal or inter-statal. In short, the 'Divine Word' with the principle of justice, equity and good conscience furnished the basis of inter-state law for the period covering the hoary past of India.

SOURCES OF THE LAW WHICH GOVERNED INTER-STATE RELATIONS

In the circumstances mentioned above, the main sources of the law regulating the intercourse between states were *Srutis* and *Smrtis*, the two well known sources of Hindu Law as such. There was absence of conventional law in the sense that law-making treaties did not exist, as stated earlier. However, there was a written text of law which may be said to have taken the place of conventions. In addition, there was custom as a recognised source of civil law as much as of inter-state law particularly as the *Smrtis* have laid down that a clear proof of usage would outweigh the written text of law.[3]

Thus according to Manu who spoke in the same strain as Yajnavalkya, the sources of all laws[4] of the age were: "the

3 *Narada Smrti*, II 24-6

आचार: परमोधर्म शास्त्राद्वृद्धिर्व लीयसी ॥
व्यवहारोहि बलवान धर्मस्तेनावहीयते ॥

It may be added that their Lordships of the Privy Council in the celebrated case of the *Collector of Madura* versus *Mootoo Ramalinga* (1868) 12 M I A, 397, 435-436, have quoted with approval the above text of *Narada Smrti* and agreed that under the Hindu legal system clear proof of usage would outweigh the written text of law

4. No less than 4 kinds of laws are described in ancient literature They are:
   (1) *Dharma* or sacred law,
   (2) *Vyavahara*, or secular law,
   (3) *Charitra* or customary law,
   (4) *Rajasasana* or Royal edict.

In addition, there were laws governing a family which were classified as *Kuladharma*. Similarly, caste laws were known as *Jatidharma* and regional laws were known as *Desadharma*.

Vedas, the *Smrtis*, the approved usage and what is agreeable to one's soul or good conscience, the wise have declared to be the quadrupled direct evidence of *dharma* or law."[5] The four-fold sources of inter-state law as of any other kind of law in ancient India may, therefore, be briefly described as follows:

(1) The four *Vedas* need no elaboration as they did not constitute an important source of law as such. Their period ranges from 4000 B.C. to 1000 B.C.[6] This is known as the period of *Vedic Samhitas, Brahmanas* and *Upanisads*. The *Srutis* are known to include the *Upanisads*. It is possible that some hymns of the *Rgveda* and the *Taittiriya Samhita* and the *Atharvaveda* may possibly go to a period prior to 4000 B.C. as much as some of the *Upanisads* may be later than 1000 B.C. This period was followed by the age of *Sutras* when important *Dharmasutras* and *Srautasutras* were compiled. According to Kane, this period ranged from 800 B.C. to 300 B.C. and witnessed the composition of *dharmasutras* such as *Gautama, Vasista, Apastamba, Baudhayana* and the *Grhyasutras* of Parasara.

(2) The *Smrtis* constitute a very important source as they provide from our viewpoint the text of conventional law as such for the governance of inter-state conduct. They remain the most important pillars of *Dharmasastra* and the chief of these metrical *Smrtis* may be enumerated as follows:

(i) The Code of Manu or *Manusmrti* compiled sometime between 200 B.C. and 100 A.D.[7]

(ii) The Institutes of Yajnavalkya or *Yajnavalkya Smrti* (100 A.D. to 300 A.D.).

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5. *Manusmrti*, II. 12.

वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
एतच्चतुर्विधं प्राहुः साक्षाद्धर्मस्य लक्षणम् ॥

6. In regard to the approximate dates of compilation of *Smrtis* and *Srutis*, see Kane, P.V., *History of Dharmasastra*, Vol. III, p. xvii. E.B. Havell, *A Short History of India* (1924), pp. 35, 74.

7. In regard to the approximate date of compilation of *Smrtis* and *Srutis*, see Kane, P.V., *History of Dharmasastra*, Vol. III, p. xvii. E.B. Havell, *A Short History of India* (1924), pp. 35, 74.

(iii) *Vishnu Smrti* which appears to be closely connected with *Manusmrti* and *Yajnavalkya Smrti* was perhaps compiled between 100 A.D. and 300 A.D.

(iv) *Harita Smrti* which is quoted by the *Dharmasutras* of Baudhayana and Vasista as an authority of Law.

(v) The *Smrtis* of Brhaspati and Katyayana (400-600 A.D.) mentioned by Yajnavalkya are not mentioned wholly and only quotations of these *Smrtis* appearing in other texts are available.

It may be mentioned here that the Code of Manu has been accepted by ancient writers as the highest authority. As far as inter-state law is concerned, *Manusmrti* contains the most valuable evidence of conventional or written law which existed in ancient India. The importance of the Institutes of Manu has been recognised in several cases which came before the Judicial Committee of the Privy Council, the highest court of appeal in the land prior to 1947. In *Shri Balusu's Case* (1899),[8] Lord Hobhouse observed, "the most revered of all the *Rishis* or sages is Manu". Again, in *Amarendra's Case* (1933),[9] it was declared that "Manu's code has always been regarded as of paramount authority" for *Veda* itself says, "whatever Manu says is medicine."

Again, a brief mention must also be made here of *Puranas* which are sometimes included in the term *"Smrtis"*. In *Ganga Sahai* v. *Lakraj Singh* (1887), *Puranas* have been "reckoned as a supplement to the scripture, and as such, constitute a fifth Veda."[10] This may perhaps be somewhat exaggerated particularly as legend and history more than law is the theme of the *Puranas* and the precise textual language so characteristic of written law present, for example, in *Manusmrti* is lacking in Puranic literature. However, the latter may be accepted as a storehouse of custom and practice and hence a source of law for state intercourse and state practice also. The age of compilation of *Puranas* is accepted as 300 A.D. to 600 A.D. when *Vishnu, Vayu, Matsya, Kurwa* and *Markandeya Puranas* were compiled.

8. 261, A, 113, 149; 22 Mad, 398.
9. 60 I A., 242, 12 Pat., 642.
10. 9 All. 253.

No account of *Dharmasastras* would, however, be complete without a mention of the commentaries on *Smrtis* which are called *Nibandhas*. The importance of these commentaries is that they developed the static concept of law arising out of the text of the *Smrtis*. If treaties furnish an important source of International Law, they also perform, in addition, a vital function, namely, that of development of law as humanity progresses requring international legislation to govern the conduct of states in their ever-increasing intercourse with each other. As law-making treaties were unknown in ancient India, this important function of development of inter-state law as much as of civil law was left to be performed by the commentaries on *Smrtis* which are numerous and often deviate from the strict text of the *Smrti* law. The Judicial Committee of the Privy Council in *Atmaram Abhimanji* v. *Bajirao Janrao*[11] (1935) observed that "the commentators, while professing to interpret the law as laid down in the *Smrtis*, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognised." Thus, for example, the *Mitaksara* is known to subordinate in more than one place the language of texts to custom and approved usage and the Privy Council has had no hesitation in laying down that "in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted."[12] A brief description may, therefore, be given of the commentators. For example, the Code of Manu has numerous commentaries such as those of Medhatithi, Govindaraja and Kulluka. Similarly, commentaries exist on *Yajnavalkya Smrti*, the most important of which is the *Mitaksara* by Vijnesvara. This has given rise to the *Mitaksara* school and to several subsequent commentaries on *Mitaksara* itself. These do not interest us here.

(3) Again, in regard to custom or usage or *achara* to be accepted as a source of law, it had to be well established, certain, unvariable and reasonable. Thus, for a customary principle to

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11. *Atmaram Abhimanji* v. *Bajirao Janrao* (1935), 62 I.A. 139, 143.
12. *Ibid.*

rank as *Deshdharma* or law of a particular region or country (*desh*), it had to be continuously recognised and accepted by the community. In regard to customs, it has been stated that they were of three kinds, namely, *Kulachara* or family custom, *Lokachara* or local custom of the community and *Deshachara* or custom of the country. In the same context, Manu[13] has described *Kuladharma* as family law, *Jatidharma* as caste law and *Deshdharma* as the law and usage governing a country.[14] In this context, it may perhaps be difficult to equate *Deshdharma* as International Law particularly as used in the modern sense. However, Dr. Chacko[15] quoting the authority of Bandhopadhyaya has come to the conclusion that the words *Deshadharma* or *Deshadi Dharma* meant international law or inter-state law by "usage". The accepted translation of *Deshdharma* would be the law of a country or a region or a particular area. There is also no definite evidence of usage having given the expression "*Deshdharma*" a wider connotation. It would, therefore, be difficult to say with any precision that by *Deshdharma* inter-state law was specifically meant. This conclusion appears warranted because matters of inter-state conduct are governed by a distinct chapter of *Dharmasastra* which is known as *rajdharma*. The rules of *Dharmasastra* that we have governing intercourse among states appear to fall within the purview of *Rajdharma* and not *Deshdharma* or *Deshadi Dharma*. The latter expression would not, therefore, appear to stand for inter-state law as such, but perhaps refer to civil law governing communities as a whole living in a particular region or a country. This aspect is, however, controversial and it would be presumptuous on anyone's part to propound a theory with any precision one way or the other.[16]

13. *Manusmrti*, I. 118.

देशधर्मञ्जातिधर्मान्कुलधर्मांश्च शाश्वतान् ॥

14. See the definition of *Deshdharma* given in the *Sanskrit-English Dictionary* compiled by Sir Monier-Williams (1956), p. 496.
15. Bandhopadhyaya, *International Law and Custom in Ancient India*, p. 16, Calcutta 1920, and Chacko in the *Indian Journal of International Law*, Vol. I, Nos. 2 and 3, p. 185.
16. In the light of the comments made by Western writers such

(Continued on next page)

In addition to the *Srutis* and *Smrtis* which may be said to constitute the *Dharmasastra*, there is the existence of important literature such as the following:—

(a) The *Ramayana* of Valmiki and the *Mahabharata*[17] constitute an important source of sacred literature which is most valuable to the student of inter-state relations as they often state the principles of law which came to be codified subsequently.

(b) *Sukranitisar* of Sukracharya is an important work on the laws of war in addition to enunciating principles on the science of polity. The *Nitisar* of Kamandaka is another important work of the same type.

Again, Kautilya's *Arthasastra* (300 B.C.) as well as contemporary historical works such as Bana's *Harsha Charitra* (600-650 A.D.) or Kalhana's *Raj Tarangani* (1150 A.D.) or writings of Fahian, Megasthanes and Hieun-Tsang furnish evidence of usages and custom but these writings cannot be regarded as a text or a source of law as such. They may at best in certain circumstances furnish evidence of how the law existed or was known or accepted in a particular period of Indian history about which they write. Thus the writings of these authors could furnish evid-

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(Continued from previous page)

as Duncan Derrett and Ludo Rocher of the University of London and Ghent (See the *Indian Year Book of International Affairs*, Vol. VII, 1958, pp. 344 and 361), to the effect that there is some sort of an unjustified haste shown by oriental scholars in deducing from very meagre and controversial evidence the existence of modern concepts of International Law in ancient India, one is not prepared to draw the inference that *Deshdharma* stood specifically for inter-state or International Law as such.

17. According to Prof Rapson, *The Cambridge History of India*, Vol. I, p. 307:

"The war between the Kurus and Pandus is historical and that it took place in ancient times cannot be doubted, however much its story has been overloaded with legend, and however late may be the form in which it has been handed down." Rapson places the Great War early in what we know the *Brahmana* period, say, 1000 B.C.

ence of inter-state law and the observations made by Lord Cockburn in the celebrated case of *R.* v. *Keyn*[18] would apply to this type of literature, namely, "writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law." It must, however, be stated that these remarks would not apply to the text of *Sruti* and *Smrti* law which ranks equivalent to the text of what in modern times is known as conventional law.

Kautilya's classic on power politics may give glimpses of customary law here and there but in the main the work concentrates on what a wily King ought to do and not what the law requires a King to do. The latter aspect is the function of the *Dharmasastra* as revealed in *Smrtis* and *Srutis.*

(4) Lastly, though the latest source of modern International Law specifically mentioned by the Statute of the "International Court of Justice,"[19] namely, "the general principles of law recognised by civilised nations" did not exist in ancient India, there was nevertheless the fourth source of law, namely, juristic writings embodied in the texts of Manu and Yajnavalkya. The latter constituted, according to Manu, the fourth pillar of evidence of *dharma* or law.[20] However, in actual practice, it is difficult to state when and how this rule of law could be applied. It could often be used or interpreted to suit one's own purpose though in theory it furnished a source of law which was dynamic in an age when the concept of law as written in *Srutis* and *Smrtis* may have tended to be static In the rules relating to inter-state law, this principle could have wide application and Krsna[21] may be said to have used it with success in his dealings with the Kingdoms of the age and in the *Mahabharata.* A classic ex-

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18. L. R. 2 *Exch. Div.* 63 at p 204

19 A38 (1) (c) of the Statute of the International Court of Justice.

20. Manu, II. 12.
Yajnavalkya, 1 7.

21. Prof. Hopkins in *The Cambridge History of India,* Vol. I, p. 259, states, "it is impossible to say whether Krsna, the divine hero of the *Mahabharata,* ever really existed, though it is probable."

ample is that of the assassination of King Sisupal by Krsna as the removal of the former had become essential on humanitarian grounds. On the broad principle of justice and good conscience, this act of killing was justified.

SUBJECTS OF THE LAW : INTERNATIONAL PERSONS OR STATE PERSONALITIES

The subjects of inter-state law in ancient India were political entities varying not only in their internal structure but also in regard to the exercise of external sovereignty. In the historical survey which follows the existence of conditions essential for the origin and growth of law among states has been described in some detail. It may, therefore, be only mentioned here that though all states that existed were not fully sovereign in the modern sense, they had constant contacts and flourishing inter-state relationship which if not on an equal plane may be accepted as quasi-equal in character. If a description of the various types of states that existed were to be attempted, the one given by Kautilya[22] is possibly the most appropriate from our viewpoint. He divides states into three types, namely:—

(a) *sama* or those which were equal in status, *i.e.*, separate, independent kingdoms, the proper persons of inter-state law,

(b) *hina* or the inferior variety such as vassal states, protectorates, etc., and

(c) *jayas* or the superior kingdoms of the *Cakravartin* type.

Thus, there were political units varying in size, shape, quality and character. As is stated later, in the Vedic age, there were tribes which also existed as political units with the king as their Head. In a state of society which was developing, it would be needless to insist on concepts of sovereignty and equality as attributes of each state since the law of inter-state conduct as known in ancient India applied to all political units which had a separate autonomous existence. Thus without insisting on sovereignty

22. Kautilya's *Arthasastra.*

and equality as *sine qua non* for development of international law, it would not be inaccurate to define the proper normal subject of inter-state law in ancient India as that political unit which had—

(a) a separate autonomous existence; and

(b) a mouthpiece of the governmental machinery to represent it for purposes of intercourse among states.

The above definition would cover Republics (*Gana Rajya*), Oligarchies (*Parmastya*), Kingdoms (*Samrajaya*), Empires (*Cakravartins*), vassal kingdoms (*Samant Rajyas*), Protectorates (*Samsrayaraj*).

In addition, there were the Greek states which had sprung up on the borders of India after Alexander's invasion and continued to have contacts with the states of *Aryavarta*. They were as much subjects of inter-state law or better still international law, which description would be certainly justified in their case, as were the other states of *Aryavarta* the various categories of which have been described before.

THE DISTINGUISHING CHARACTERISTICS OF THE CONCEPT OF THE LAW OF NATIONS AS IT DEVELOPED IN ANCIENT INDIA

(1) *Universality of application*

If the concept of the Law of Nations comprises a body of rules whether customary or written, which the states in their intercourse with each other consider as binding, it would perhaps not be quite accurate to observe as Oppenheim has done, that International Law "in its origin is essentially a product of Christian civilisation and began gradually to grow from the second half of the middle ages."[23] Apart from the fact that the Christian civilization may not have quite enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct, it is submitted that the concept of Christendom itself, hampered the development of international law on the broad basis on

23. Oppenheim, *International Law*, Vol. I, 8th Edition 1955, p. 6.

which it exists today. For example, the principle that the rules of civilized conduct among nations applied to states within Christendom alone and nothing of a binding nature could govern the relations of a Christian state with a non-Christian state, did lasting damage to the development of the correct concept of modern international law which recognises political entities irrespective of their religious beliefs. Even in the thirties of the present century, Mussolini's Italy when using expanding bullets in its war with Ethiopia took the plea that as the latter was outside Christendom, the recognised rules of warfare could not apply to the Italo-Ethiopian conflict of 1936. Even the concept of the mediaeval Muslim Law of Nations outside India was not universal in character since it was "primarily concerned with regulating the relations of entities and nations within a limited area and within one civilisation."[24] However, ancient India and subsequently the later medieval India under Muslim rule remained fortunate in being free from such prejudices which would limit the application of the law of nations to one's own civilization itself.

If we make a probe into the history of ancient India we find that no distinction between believers and non-believers was recognised in regard to inter-state conduct (in ancient India) and even when the former were involved in a death struggle of war with the latter or whether the war was fought within or without *Aryavarta* or whether it was a just and righteous war (*Dharma Yuddha*) or an unjust war (*Adharma Yuddha*), it was expressly enjoined by the sacred laws of *Dharmasastra* that all belligerents at all times and in all circumstances must adhere to the accepted rules of warfare.

(i) A study of the *Smrtis* would undoubtedly reveal that ancient India had a highly developed system pertaining to the laws and rules of war based on considerations of humanity and chivalry. The rules of warfare applied even if the struggle was in the nature of a civil war which is again in conformity with the modern concept of recognition of belligerency and insurgency. Again, the general rules of warfare as prescrib-

24. Majid Khadduri, *War and Peace in the Law of Islam*, 1955; p. 43.

ed by the Code of Manu which came later (200 B.C.-100 B.C.) or other law-givers were governed by the principles of humanity and chivalry. For example, Manu lays down: "one who surrenders or is without arms or is sleeping or is naked, or with hair untied (i.e., unprepared) or is an on-looker (non-combatant) must never be killed," irrespective of whether the opponent was a believer or *Arya* or a *Yavana* (alien non-believer) or whether he was fighting a just war or not.[25] The dictates of humanity coupled with consideration of universality of application irrespective of creed helped the development of law of war in ancient India on a basis as it is known today.

(ii) Again, the distinction between combatants and non-combatants and the rule forbidding weapons of war destruction was not only formulated but there are examples of its recognition in ancient India.

(iii) A classic example of the observance of the rules of warfare is to be had when Lakshmana in the war against Ravana, the demon King, was forbidden by Rama, the King of Ayodhya, to use a weapon of war which would destroy the entire race of the enemy including those who did not bear arms, because such destruction *en masse* was forbidden by the ancient laws of war even though Ravana was fighting an unjust war with an unrighteous objective and was classed as a devil-demon himself and hence could be considered outside the then world of civilisation.[26] Another such example is to be found in *Mahabharata* when Arjuna observing the laws of war refrained from using the "Pasupathastra", a hyper-destructive weapon, because when the fight was restricted to ordinary conventional weapons, the

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25. *Manusmṛti,* VII. 91, 92.

न च हन्यात्स्थलारूढं न क्लीबं न कृताञ्जलिम् ।
न मुक्तकेशं नासीनं न तवास्मीति वादिनम् ॥
न सुप्तं न विसन्नाहं न नग्नं न निरायुधम् ।
नायुध्यमानं पश्यन्तं न परेण समागतम् ॥

26. *Ramayana,* Yuddha Kanda Sloka 39.

तमुवाच ततो रामो लक्ष्मणं शुभलक्षणम् ।
नैकस्य हेतो रक्षांसि पृथिव्यांहन्तु मर्हसि ॥

use of extraordinary or unconventional types was not even moral, let alone in conformity with religion or the recognised laws of warfare."[27] This unique concept contributed to inter-state law in the field of belligerent relations has yet to win recognition at the hands of the sovereign states of the world though jurists are prepared to press for its acceptance today.

(iv) Moreover, the Indian customary laws governing inter-state conduct scribed by *Smrtis* and based on principles of chivalry governed the conduct of administration of enemy occupied territory and also prescribed the treatment to be meted out to the defeated enemy king in the following words of Manu:

> "When a king has conquered a foreign foe he shall make a prince of that country (not of his own) the king there, and (Vishnu adds, III, 49) he shall not destroy the royal race of his foe unless that royal race be of ignoble birth. He is to honour the gods and the customs of the conquered country and grant exemption from taxation (for a time) (Manu, VII, 201)."[28]

The above treatment was prescribed for the enemy king irrespective of whether he belonged to Indian or foreign civilisation as is clear from the treaty signed between Seleukos and Chandragupta Maurya in 305 B.C. when the former accepting defeat retired and concluded a humiliating peace.[29] However, Chandragupta accorded to Seleukos the treatment of an independent foreign sovereign. The rules governing this particular aspect were so well known and well-established that the Macedonian world conqueror Alexander the Great learnt of them in detail while waiting on the banks of the Hydaspes in the summer of 326 B.C. planning to give battle to the Indian King Paurava or Poros. It is possible that Alexander having heard of the chivalrous rules

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27. *Mahabharata,* Udyog Parva, 194. 12.

    यत्तदघोर पशुपतिः प्रादादस्त्रं महन्मम ।
    कैराते द्वन्द्वयुद्धे तु तदिदं मयि वर्तते ।।

28. *Cambridge History of India,* Vol. I, p. 290.

29. Vincent Smith, *Early History of India,* p. 125.

    जित्वा सम्पूजयेद् देवान् ब्राह्मणांश्चैव धार्मिकान् ।
    प्रदद्यात्परिहारांश्च ख्यापयेद मयानि च ।।

of warfare recognised by the Indian warrior class had perhaps made up his mind before the battle began to treat Paurava according to the Indian concept of the law on the subject. Thus after the battle of Hydaspes had been fought and won, victorious Alexander summoned in his presence the defeated Indian King Paurava, and enquired of him how he should be treated. The Indian king replied, "Act as a King." The victor not only confirmed the vanquished prince in the government of his ancestral territory, but added to it other lands of still greater extent and by this method secured a grateful and faithful friend.

Thus the first essential characteristic of the concept of the law of nations in ancient India was its universality of application irrespective of limitations of religion or civilization To the state in ancient India, Islamdom, Christendom, Greekdom or Aryandom would have made no difference as far as inter-state relationship was concerned which is such an essential feature of the correct concept of the Law of Nations whether we think of the world of today, yesterday or of tomorrow.

(v) The contacts of the ancient Indian civilization with states or political entities professing a different civilization were many and well-established. The institution of *Rajduts*,[30] *i.e.*, sending of ambassadors or envoys for *ad hoc* work or for short sojourns in the courts of other states, even if the modern concept of permanent embassies was not known then, was not confined to states of the Indian group but was in vogue in relation to the Greek states that had come into existence on the north-west border of India in the wake of Alexander's invasion of 326 B.C. While both Christendom and Islamdom confined official inter-state relations within their sphere of belief and no instances of any marked importance have come to light indicating exchange of ambassadors with countries outside their pale of civilization, India had not only such ambassadors accredited

30 The Code of Manu not only allots a distinct time in the programme of a monarch for discussions with foreign ambassadors and consideration of their reports but describes in detail the qualifications of a good envoy and the functions he is required to perform

Manusmrti, VII. 63-66, 153.

to foreign countries but received foreign envoys to Indian courts as evidenced by Megasthenes who came to the court of Chandragupta Maurya in 303 B.C. representing the kingdom of Seleukos Nikator.[31]

(2) *Lex as Rex and Pacta Sunt Servanda*

The second distinguishing characteristic of ancient India is the supremacy of *dharma* or law so vital for the well-being of the community of states. In fact, the supremacy of law and the sanctity of treaties constitute the two basic principles which remain a *sine qua non* for the growth of law among states. If the conditions necessary for the origin and development of international law are examined, it will be found that *first*, there must be the existence of separate political units, howsoever loose-knit they may be, whether tribal or confederal, so long as they (a) are independent of each other; and (b) have their own governmental machinery with an appropriate organ as a mouthpiece like the *Vicapati* or the King, and the rest can be left to the human social instinct for developing inter-unit relations and the consequent need for their regulation. (This aspect is described subsequently when dealing with the concept of *Cakravartin*—narrated as the fourth distinguishing characteristic of ancient India which continued to dominate the entire course of the Indian history including the British period right up to 1947). *Secondly*, but in no way less important than the first condition, is the basic need for an atmosphere of respect for law and a general feeling for due observance of agreements solemnly entered into without which no amount of extensive or intensive inter-state relationship would give birth to a law of nations as such. It is this important aspect which needs elaboration and is discussed below.

31. Vincent Smith, *Early History of India Including Alexander's Campaigns*, Oxford University Press, 1924, pp 124 5.
It is clear that in 312 B.C Seleukos recovered possession on Babylon and a few years later he assumed the regal style and title He has been conventionally described as King of Syria and was the Lord of Western and Central Asia. Thus Megasthenes represented a separate independent kingdom.
See also *The House of Seleukos* by Bevan.

The concept of *dharma* or law as identified with *danda* or sanction lies at the root of the origin of the state and society as Manu holds that the Lord (creator) gave birth to his own son—*danda*, the Protector of all creatures, an incarnation of the law itself, formed out of the Glory of *Brahma* Himself.[32] Thus *danda* which in its crude concept is the basis of the theory of force, is admitted only in its highly elevated legal concept of *dharma* implying sovereignty and linking itself with the moral order not merely of human society but of the entire universe. Thus naked force no longer remains the *ultima ratio* of kings but a weapon for the implementation of *dharma* or law. *Sukraniti* points out that *dharma* is enforced through *danda* and both combined become the embodiment of the highest virtue in preventing aggression[33] Thus Manu's equation of *danda* with *dharma* (*Dandam Dharmam Vidurbudhah*) means the supremacy of *dharma* or law which has the highest sanction of *danda* behind it. The king and the entire political order under him have to serve *dharma* and bow to law at all times. Again, *danda* divorced of *dharma* could no longer be a weapon in the hand of the king which meant that *dharma* alone was sovereign. Dr. Mukherji has aptly described this position as follows:[34]

> "The true sovereign of the Hindu state is *dharma*, the law and constitution, which is upheld and enforced by the king or supreme executive as *danda*."

Dr. Kane has also come to the same conclusion after a very careful research of the ancient text. He summarises the position thus:[35]

> "The *Dharmasastra* authors hold that *dharma* was the supreme power in the state and was above the King who was only the instrument to realise the role of *dharma*."

32. *Manusmrti*, VII. 14.
33. *Sukraniti*, IV. 48 .
34. Presidential address given by Dr R.K. Mukherji at the 25th session of the Indian History of Congress, Gwalior. See also Dr. R. K. Mukherji, *Chandragupta Maurya and his Times*, p. 49.
35. Dr. P. V. Kane, *History of Dharmasastra*, Vol. III, p. 241.

Thus in both political and legal theory, the supremacy or sovereignty of law was well established and recognised as such. It is difficult to talk of political practice which may quite often have deviated from the theory but that does not cast any reflection on the theory as such which is so well enunciated and clearly recognised by the *Srutis* and the *Smrtis*, the two main sources of Hindu Law.

If the theory of brute force based on Machiavellian tactics has been advocated in *Arthasastra* by writers like *Kautilya*, its position in strict law has to be examined in relation to the principles of *Dharmasastra*. As already mentioned, several authorities including Yajnavalkya can be quoted to establish that in the case of a conflict between *Arthasastra* and *Dharmasastra* the latter was to prevail over the former. In fact, the supremacy of *Dharmasastra* was so well established that all important literature on *Arthasastra* itself recognised *dharma* or law as the highest objective. Thus *Kamasutra* states that *Dharma* is the highest goal and *Kama* is the lowest of the three *Purusharthas*.[36] Even Kautilya's *Arthasastra* categorically states that "in any matter where there is a conflict between *Dharmasastra* and practice or between the *Dharmasastra* and any secular transaction, the King should decide the matter by relying on dharma alone"[37] Similarly, *Yajnavalkya Smrti* and Narda in *Vyavahar matrka* state that *Dharmasastra* rules are to be preferred to the dictates of *Arthasastra*.[38] As the words '*Arthasastra*' connote all literature on the science of polity and statecraft, the subordination of all state policies to *dharma* or law is of the highest importance for a correct appreciation of the legal position in ancient India. The legal theorists who interpreted the sacred law in ancient India realised the deep-rooted conflict between dictates of *raison d'etat* and *rationes leges*. *Mitaksara* goes to the extent of giving an illustration as to how *lex* was to prevail over all political considerations which the principles of *Arthasastra* could put forward Thus, for example, a conflict may arise if *Arthasastra* or the science of polity as such (not confined to Kautilya's work)

36. *Kama Sutra*, I 2 14.
37. *Arthasastra*, III. 1.
38. *Yajnavalkya Smrti*, I. 39.

declares that a king should endeavour to make friends with his subjects as the acquisition of friends is superior to the acquisition of gold and land, and the rule of *Dharmasastra*[39] is that a king has to dispense justice among his subjects being free from anger and avarice and in accordance with the dictates of law or *dharma*. In such circumstances, if an appeal comes before a king for decision, he must act according to law or *dharma* even though he may lose the friendship of a person if the King's decision goes against the latter. This example should establish beyond doubt that where principles of *Arthasastra* or the science of polity prescribed Machiavellian tactics and adoption of acts completely divorced from rules of fairplay and morality, the latter could not prevail over the code of conduct prescribed by *dharma* or law. Even Kautilya distinguishes a *dharmavijaya* which is just conquest from *asuravijaya* or unrighteous conquest or *lobhvijaya* which is conquest undertaken for sheer greed.[40] Kautilya does not hide his complete disapproval of *asura* or *lobhavijaya* which fact is often forgotten by Western writers who often see only the praise for the many acts of perfidy which Kautilya advocates to attain success in war and politics and ignore the considerations of *dharma* or law of which Kautilya was not completely devoid.

Lastly, we may examine the concept of the supremacy of law in relation to the ultimate end or objective of the state. In the *Brhaspatya Sutra*, the ultimate fruit of polity is described as the attainment of *dharma* as the first and foremost item and *artha* and *kama* as the second and third.[41] The *raison d'etre* of the state in ancient India, therefore, was the upholding of law and the creation of conditions of peace, order and happiness for which Divinity had prescribed *dharma* as the doctrine, the king as the executor of it and *moksa* (salvation) attained by *dharma* as the ultimate goal of all

Thus viewed from all angles and every viewpoint, *dharma* or law ranked supreme in ancient India *first* in the context of

39. *Arthasastra* translated by Shama Sastri, p. 461.
40. *Ibid.*, p. 461.
41. *Ibid.*, II, 43.

the origin of the state where *dharma* and *danda* get identified since law without sanction is meaningless and if law is to be supreme it must have the supreme sanction behind it, and there is no entity higher than law itself when the state and society are created. *Secondly*, when the state expands or in its inter-statal relations wages wars guided by the principles of *artha*, there is a limitation imposed by *dharma* that wars fought in a righteous cause are alone justified. The sanction given to undertake just war as against unjust, basically upholds the principle of supremacy of *dharma* as against *artha*. *Thirdly*, in the peaceful existence of the state when it maintains law and order and dispenses justice internally, the king as the sovereign power is subjected to *Dharmasastra*, and it is *lex* which is crowned as *rex* and not otherwise. *Lastly*, the end of the state itself is *dharma* and not *artha* or *kama*. Thus from the origin to the end *dharma* alone prevails. This basic idea governs all the theories of ancient India though quite a number bring out prominently the concept of force and the administrative principle which led to the elaborate organisation of defence, an essential limb of state machine. Thus whatever has been stated in the previous pages must necessarily be read in the context of the theory of the supremacy of law which was meant to regulate inter-state conduct as much as the internal governance of a state. The word 'Law' could perhaps be used, in a loose sense at least, to indicate the governance of inter-state conduct even if proper international law in the modern sense did not exist.[42]

The second principle essential for the growth of inter-state or international law is the observance of the rule *pacta sunt servanda*. When inter-state contact begins, according to ancient writers on polity, there is bound to be either indifference, agreement or difference. As differences have generally to be settled whether by war or by peaceful methods such as negotiation, they often end in some sort of agreement reached amicably or otherwise. It is of the essence of law that such agreements duly

42. As the word 'nation' occurs in a special sense in modern literature it is perhaps safe to describe the regulation of relationship between two independent states in ancient India as inter-state law rather than international law.

reached between states on the basis of accord or friendship or even after war should be respected else there would be the negation of law *ab initio*. There is abundance of authority in ancient India which attaches the highest importance to the maintenance of agreements reached either in writing or by word of mouth. Even Kautilya asserts that "peace depending upon honesty or oath is immutable both in this and the next world."[43] In this respect he goes a step further than his teacher in discarding the principle of obtaining hostages as a security to cement the binding nature of treaties Kautilya remarks, "it is for this world only that security or a hostage is required for strengthening the agreement."[44]

In short, therefore, the existence of an atmosphere which held law as supreme and respected agreements between states as inviolable must be said to furnish the necessary condition for the healthy development of international law howsoever different it may be from the modern concepts of today. In this connection, it is essential further to examine the first condition relating to existence of independent political units particularly because the concept of *Cakravartin* conflicts with the continuance of separate political entities and, therefore, appears, *prima facie*, to spell the eclipse of inter-state conduct.

(3) *The concept of Cakravartin and the historical development of law among States in Ancient India*

There are certain pre-requisites for the origin and development of law among nations First and foremost, there should be separate independent political units with their own governments howsoever primitive the latter may be, whether tribal, feudal, monarchical, republican or oligarchical. Secondly, there must be the urge or need for intercourse among them It is the growth of intercourse which requires regulation and herein lies the *raison d'etre* of international law. However, in order that such regulation may come to have force of law, the third basic condition for the growth of international law would

43. *Arthasastra*, translated by Shama Sastri, p. 381.
44. *Ibid.*

appear to depend upon the nature of sanction developed in the sphere of governance of inter-state conduct.

In the socio-political order which existed about the dawn of human civilization, it would be premature to expect the existence of sovereign independent states in the modern sense described by jurists of today as "international persons". It is true that intercourse among non-sovereign states cannot ever be said to be governed by international law. However, in the early growth of the law itself which was bound to be associated with the growth of political units, the regulation of intercourse among states would appear to fall within the purview of international law provided always that there was legal equality among those units and the essential feature of their independence was not lacking. As intercourse is between governments of separate political entities, emphasis must be placed on the need for the existence of a governmental organ even though the general structure of the state may be loose being tribal or feudal provided that the Government functioned as that of an independent unit. The latter aspect is important because if a unit existed and developed intercourse on a subordinate basis with another unit, the relationship would be as between a vassal and a suzerain and hence not on the inter-statal or international plane. Thus the existence of tribal society in the Vedic times and the concept of *Cakravartin* or paramount ruler of a world state in the age of the epic wars and as described in the *puranic* literature appear to disturb the conditions necessary for the development of international law. However, on closer scrutiny it could be demonstrated that the tribal set-up of Rgvedic society could be no hindrance to the development of a law among states since several tribal units existed independent of one another and they had a governmental organ in the form of a king. Similarly, the concept of *Cakravartin* in the later era did not prevent the existence of units on the basis of legal equality and, in any case, during the stage of attainment of the ideal of *Cakravartin*, there was bound to be inter-state conflict helping the process of development of law among states. As international law in its earliest form can trace its existence to the origin of the state itself, the development of the concept of the political state is linked

up with the history of the development of international law. A brief historical sketch, therefore, would not be out of place if it could indicate the different conditions which governed the various stages in the development of law among states and nations.

(i) *Vedic Age* (400 B.C.—1000 B.C.)[45]

According to Keith and Rapson, "the earliest documents which throw light upon the history of India are the hymns of the *Rgveda.*"[46] From the scanty information provided by Vedic literature on the political organisation then prevailing, it appears that there were separate tribes in existence which had their own governmental organ in the shape of the King and there was plenty of intercourse between them often giving rise to strained relations leading to warfare. Thus the distinguishing feature of the Vedic age was the growth of inter-tribal relationship.

Thus the broad pre-requisites for the growth of inter-state law were present in the Vedic age. It was the existence of the governmental organ of the "Rajan" or King which by its very nature gave equality of status to the competing political units and fostered intercourse among them. Howsoever tribal a society may be in the age of the *Rgveda,* there is no dispute that the tribes were "certainly under kingly rule". As Keith mentions "there is no passage in the *Rgveda* which suggests any other form of government, *while* the king under the style 'Rajan' is a frequent figure. This is only what might be expected in a community which was not merely patriarchal—a fact whence the king drew his occasional style of *vicpati,* 'Head of the vic'—but also engaged in constant warfare against both Aryan and aboriginal foes."[47] The functions of the sovereign on which most stress was laid related to his duty of protecting the subjects and "even the *Rgveda* despite its sacerdotal characters allows

45. The dates adopted for the purpose of this chapter are those accepted by P. V. Kane in "History of Dharmasastra", Bhandarkar Oriental Research Institute, Poona, 1946.

46. *Cambridge History of India,* Vol. I, Chapter IV, p. 77.

47. *Ibid.,* p. 94.

us to catch some glimpses of the warlike deeds of such men as Divodasa, Sudas and Trasadasyu."[48] As it appears that the tribal set-up led to frequent warfare, the king was duly assisted by a hierarchy of officials including a regular *Senani*, the commander-in-chief of the army. Again, the rules of warfare provided the first subject needing attention since better experience had taught that wars fought without any regulation were likely to prove most damaging to both the belligerents. Thus as a matter of necessity and in the interests of all concerned, the regulation of warfare appears to have emerged as the starting point of a law destined to govern several other spheres of inter-state relationship. The one great historical event described in the *Samhita* of the *Rgveda* is the contest known as the battle of the ten kings. This conflict was perhaps between the Bharat King Sudas who was the Lord of the country, later known as Brahmavarta, and the tribes of the north-west. The victory of Sudas at *Parushni* records that King Anu and Druhyu fell in the battlefield but there was no conquest of territory since Sudas was compelled to return to the east of his kingdom to fight King Bheda who was assisted by three tribal kings constituting a grand military alliance against King Sudas. These and other incidents indicate beyond doubt that the basic conditions needed for the development of international law did exist even in the Vedic age in so far as there were independent political units with the institution of the king furnishing the necessary governmental organ for communication. It is difficult to state with precision whether the political units were fully sovereign in the modern sense but there is ample evidence that the King in ancient India was always regarded as the personification of the sovereignty of the people. Thus when a king entered into a transaction with another king, it involved relationship between two states and not between two individuals. It would perhaps not be inappropriate to conclude that the king represented his people and the organisation which governed them. The petty tribal principalities so often mentioned in *Rgveda* would thus appear to be externally fully sovereign in so far as their relationship with other similar units was concerned. That there was legal equality

48. *Ibid.*, p. 95.

among them can hardly be doubted and this by itself satisfies the first essential condition for the origin and growth of a law of nations.[49]

(ii) *The Period of the Epic Wars* (1900 B.C.—1000 B.C.)[50]

The law of war received added impetus during this period and from the literature provided by *Mahabharata*, it can be stated that the rules on the subject not only got crystallized and properly formulated but there was the necessary halo of sanctity developed round them in regard to their observance. This is apparent from both *Ramayana* and *Mahabharata* since even in the midst of the struggle, Bhisma and Karna referred to the sacred principles of warfare now given a distinct title of "*Yudha-Dharma*". Another important feature of this age was the concept of *Cakravartin* developed on the basis of religious ceremonies like the *Ashvamedha*, the *Rajasuya* and the *Vajapeya* sacrifices. The one who was able to perform these sacrifices could best be described as an Emperor having under him a number of vassal kingdoms who owed allegiance, howsoever nominal it may be, to the imperial person. Thus there were several grades of rulers in ancient India. The word '*Rajan*' occurs at numerous places in *Rgveda* and may be said to stand for an ordinary king. However, the word 'samrajya' which is used as an epithet of Varuna and of Indra may be said to connote the idea of an emperor having suzerainty over several kings. In the *Satapatha Brahmana* a clear distinction is made between a king (Rajan) and an emperor. It is said that by "offering the Rajasuya he becomes king and by the Vajapeya he becomes emperor; and the office of king is the lower and that of emperor higher."[51] This concept of *Cakravartin* or *Samarajya* or *Ekarat* was fully developed by the time of the composition of *Aitareya*

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49. According to Dr Beni Prasad, *The State in Ancient India* (1904), p 23, it was only after the 6th century B C. that the concept of territorial sovereignty superseded the tribal concept of state in ancient India.

50. Kane, *History of Dharmasastra*, p. 900.

51. See also E.B. Havell, *A Short History of India*, p. 11, for the date of King Dushratha or Dasarathe.
Kane, *History of Dharmasastra*, Vol. III, p. 65.

and *Satapatha Brahmanas.* For example, the former mentions as many as 12 emperors of ancient India and *Satapatha Brahmana* mentions 13 emperors. Again, Panini defines '*sarvabhauma*' as the lord of the whole earth. The famous Sanskrit dictionary '*Amarakosa*' states "that a king before whom all feudatories humble themselves is styled '*adhisvara*' or '*cakravartin*' or '*sarvabhauma*'," the last three words being synonyms. Thus, ultimately, all things considered, the word '*Cakravartin*' stands for one who wields lordship over a circle of kings and not necessarily over all kings of the land. The fact remains that there were several *Cakravartins* and *Maitri Upanisad* mentions as many as 15 of them. It is, therefore, submitted that there was perhaps ample opportunity for the development of international law as between these imperial units which were co-equal in status. It is true that if there had been only one *Cakravartin* in the whole country, the relationship would not have been inter-statal but confined to that of vassals to a suzerain which is certainly derogatory to the conditions required for the development of law among equal political units. However, that was not the position in a law where *Cakravartins* apparently abounded.

Thus if the concept of *Cakravartin* did not conflict with the development of International Law in ancient India, there is ample evidence to indicate that it gave considerable impetus to the development of the laws of war. It may be true as Derret puts it that the "Cakravarti-mirage" teased all rulers and, in practice, posed an ideal before ambitious monarchs which resulted in constant warfare. However, in theory, the concept of *Cakravartin* was perhaps meant to provide lasting peace in as much as, in principle at least, it aimed at striving for one world government, taking the geographical area from the Himalayas to Cape Comorin as the *Cakravarti Kshetram.* The petty chieftains who accepted the allegiance of the *Cakravartin* did not lose their independence except for loss of control over external relations. They became protectorates or members of a loose-knit confederal empire in which they were internally sovereign. Thus the discipline imposed by the concept of *Cakravartin* ruled out perpetual petty warfare amongst the innumerable chieftains who exercised authority in the plains of ancient India. It is true,

however, that the theory remained wide away from the practice inasmuch as no single *Cakravartin* rose to the position of establishing one world (country-wide) government. On the other hand, several *Cakravartins* grew up and the *Mahabharata* mentions as many as five empires of old with ever-increasing rivalry amongst them leading to frequent warfare which, in turn, necessitated enunciation of correct principles for regulating warfare and keeping it at the very highest level so as to prevent fall of humanity from chivalrous conduct. Thus proper restraints were placed on the inhumanity that a conqueror could resort to in the hour of victory. *Yajnavalkya* prescribes that it was the duty of the conqueror to protect the conquered territory in the same way as he would his own country and the conqueror was at all times to respect the customs, laws and usages of the conquered country. Again, *Vishnu Dharma Sutra* and *Agnipurana* also prescribe similar rules. Above all, however, is the celebrated verse of *Katyayana* in the *Rajniti Prakasa* wherein it is laid down that even when the vanquished king was at fault, the conqueror had no right to molest the country since the vanquished king could not have resorted to his unlawful acts by the consent of all his subjects.

Thus, on the whole, the distinct contribution of this period was the formulation of the laws of war more than a thousand years before the birth of Christ. Their proper codification may be said to take place in *Manusmrti* (200 B.C.) when they were elevated to the sacred laws of *Dharmasastra.* However, even prior to this date, there can be little doubt that the laws of war were well defined and recognised as *Yuddha Dharma.*

Thus the existence of wars between one *Cakravartin* and another or between an aspiring *Cakravartin* and petty chieftains did bring about necessary conditions for the development of International Law particularly in the sphere of the laws of war. Let alone the age of the epic wars, there can be little doubt of the existence much later of a family of states if not of nations since Rhys Davids[52] enumerates the existence of as many as 16 republics and several independent monarchies many more than republics in number flourishing even in the 6th century

52. Rhys Davids, *Buddhist India* (1911), p. 23.

B.C. *Ubi Societas ibi est Jus* and the existence of comity of states with their constant contacts for which there is ample evidence fostered the development of rules to govern their inter-statal relations.

(iii) *Alexander's Invasion and the Growth of International Law concepts* (326 B.C. and after).

In the history of development of international law concepts in ancient India, the invasion of Alexander the Great may be said to mark the beginning of a new age in as much as political and diplomatic relations came to be established beyond the frontiers of India. The establishment of inter-state relationship based on contact with *Yavana* states was the direct outcome of Alexander's invasion since the kingdoms which he left behind him on the frontiers of India continued to exist much after he had departed for Greece. This period may, therefore, be regarded as remarkable in the growth of a new kind of inter-state relationship both in peace and war. With Megasthenes in Chandragupta's court and political relations with Seleukos who became the king of Babylon and Syria developing across the frontiers of India, the institution of ambassadors, the legal formality and procedure of concluding treaties and their enforcement on a truly international plane and the observance of rules of warfare when the enemy hailed from quite a different civilization, were some of the important elements which obtained recognition. An entire book could be devoted to describing interesting episodes bearing on international practice, but suffice it to say here that the Greek invasion followed by the establishment of Greek kingdoms developed concepts and codes in more spheres than one to regulate inter-state conduct.

Alexander may be said to answer the role of *Cakravartin* more appropriately than ever before both in regard to the autonomous vassals he created including Poros whom he reinstated and the extensive conquests he undertook. However, he was a foreign *Cakravartin* as he failed to penetrate the heart of Aryavarta.

(iv) *The impact of Buddhism and Jainism* (600 to 350 B.C.)

Again, though chronologically the birth of Buddha (563 B.C.)

and his death (483 B.C.) had taken place well before Alexander's invasion (326 B.C.), the impact of Buddhism, as far as inter-state relationship is concerned, was felt more in the reign of Asoka (274-237 B.C.) than ever before. The greatest contribution of Buddhism, as far as we are here concerned, was the renunciation of war based on the principles of shunning violence at all stages and at all events.

Asoka took upon himself the responsibility for the spread of Buddhism beyond the Indian frontiers and in doing so established deep-rooted inter-state relationship not only with the neighbouring countries such as Ceylon, but also with countries in Asia and Europe. The exchange of ambassadors and envoys did much to develop the legal concept of this institution which may not have been a permanent one as ambassadors are known today, but there is no doubt that they existed in full bloom and were fully utilised in ancient India to propagate national or state viewpoints whether religious or political since envoys are known to have stayed for months and even years in the courts of other countries for this purpose. If the *Cakravartin* concept is to be regarded as persisting in Indian history, Asoka may be accepted as the first *Cakravartin* and the one and the only of his own kind. His greatness lay in becoming a *Cakravartin* after imposing on himself a self-denying ordinance, namely, the renunciation of war in all inter-state dealings.[53] He built and extended his empire of peace on the basis of the sacred law of *dhamma vijaya*. His domain, therefore, comprised of a loose confederation of independent units of states or vassals which accepted Asoka as the politico-religious head and in turn renounced their right of war in their relationship with each other. Ex-

53. See the 13th Rock Edict of Emperor Asoka translated by Vincent Smith in *Ashoka, the Buddhist Emperor of India*, p. 24. The Edict declares as follows:

> "Directly after the Kalingas had been annexed began His Sacred Majesty's zealous protection of the law of piety (*Dhamma Vijaya*), his love of that law and his inculcation of that law. Thence arises the remorse of His Sacred Majesty for having conquered the Kalingas, because the conquest of a country previously unconquered involves slaughter, death and carrying away captive of the people." The Great King never waged war thereafter.

ternally too the empire was wedded to peace and, as stated before, all inter-state relations were developed on that basis alone.

(v) *The end of the Ancient World and the beginning of the Middle Ages* (To 648 A.D. and after; the Rajput period)

In chronological order, the rest of the period of ancient history could be divided into two broad categories. The first would cover the period beginning with the fall of the imperial Guptas to the death of Harsa (647 A.D.). The second would relate to the Rajput period of Indian history beginning with 647 A.D. and going up to the conquest of India by Sultan Mahmud of Ghazni in the 11th century A.D. This is no place to give a chronological account of the Gupta emperors or their great conquests or court splendours. In the pursuit of imperial expansion they came in contact with several states on the basis of both peace and war. The concept of *Cakravartin* was revived again and both Samudragupta and Chandragupta Vikramaditya performed *Asvamedha* sacrifices. War again came to govern interstate relationship after the interlude of peace as the basis of state conduct furnished by Asoka. Samudragupta maintained diplomatic relations with the foreign Kushan princes of the northwest as well as with Ceylon. We have an example of how the Buddhist King of Ceylon, Meghavarna (352—379 A.D.), desirous of founding a monastery in India for his nationals, sent a mission to Samudragupta offering presents of gems and seeking permission to build a monastery on Indian soil. The required permission was given and King Meghavarna built a three-storeyed monastery which Hiuen-Tsang saw in flourishing condition in giving hospitality to pilgrims from Ceylon. Chandragupta Vikramaditya was also responsible for extensive conquests in pursuit of the *Cakravartin* ideal. Again, Harsa (606—647 A.D.) who was the last of the great emperors of ancient India, maintained diplomatic intercourse with the Chinese emperors. An incident which dates back to 647 A.D., immediately after the death of the king, deserves to be mentioned as it involved the violation of the principle of diplomatic immunity and its restoration with due apologies. King Harsa had sent an envoy in 641 A.D. to the Emperor of China and the latter had reciprocated by a Chinese Mission which came to the court of Harsa and stayed

for considerable time. When it did go back to China in 645 A.D., another diplomatic mission returned the following year with Wang Hiuen Tse as the Head of the new Mission with an escort of 30 horsemen. However, immediately after Harsa's death, the country was plunged into anarchy and one of his ministers Arjun usurped power and attacked the Chinese Mission. It is reported that members of the Mission were taken prisoners or killed and the property of the Mission was plundered. However, Wang Hiuen Tse managed to escape into Nepal and the succeeding year, with the help of the King of Tibet who had married a Chinese princess, descended into the plains and laid siege to the city of Tirhut. The usurper Arjun fled after fighting two battles in quick succession. On hearing this, Kumara, the King of Eastern India, who used to attend the religious assemblies of Harsa, while appreciating the violation of an important principle of law in molesting a foreign Mission, apologised for this gross misconduct and sent Wang Hiuen Tse gifts and abundant supplies of cattle which were accepted. It appears that Tirhut remained for some time subject to Tibet's control which at that time was a powerful state and, Vincent Smith records, was strong enough to defy even the Chinese Empire. It may be reiterated here that the diplomatic immunity of ambassadors was well established and duly recognised in ancient India. According to Valmiki, Hanuman was sent as Rama's ambassador and the doctrine of immunity from arrest and non-subjection to territorial laws was elucidated by Vibhisana, so clearly recorded in the passage in the *Sundara Kanda* of the *Ramayana*. Vibhisana states emphatically that according to the *Smrtis*, ambassadors could not be injured or killed and that Ravana had no right to molest Hanuman. Again, the *Udyog Parva* of *Mahabharata* describes in some detail the embassy sent on behalf of the Pandavas by Drupata. Sanjaya who was chosen as an ambassador by Dhritarashtra, was told by Krsna that, "though the Pandavas were ready to fight, they were always willing for peace." Later on, when Krsna went to see Duryodhana on behalf of the Pandavas, Duryodhana had an evil design to make him a captive. Dhritarashtra opposed this course by stating emphatically that it would be a violation of *Dharmasastra* to make an ambassador a captive. Moreover, in the *Santi Parva*, there is

a description in the *Rajdharma Kanda* of the sacredness of the protection to be afforded to an ambassador.

With the death of Harsa, the ancient world may be said to come to an end as by 712 A.D. the armies of Khalif Walid under the command of Mohammad Bin Kassem had entered Sind. The whole of Northern India had been divided into petty Rajput principalities which were often at war with each other and a new concept of inter-state relationship was to develop with the onslaught of Islam. However, when warfare became common both within and from attacks without, it has to be said to the credit of the Rajput kingdoms that they did not depart from the principles of humanity and chivalry which had regulated warfare in ancient India. Thus when for the first time the Rajput states came in contact with the Central Asian invader professing a different faith, it was the Rajput who was still adhering to the laws of war as he had inherited them from the *Srutis* and the *Smrtis*. This is amply demonstrated by the two battles fought in 1191 and 1192 A.D. by Prithviraj Chauhan of Ajmer against Mohammad Ghori. The development of the Law of Nations in mediaeval India constitutes a different chapter in Indian history and it is dealt with subsequently in Part II which follows.

However, no account of Ancient India would be complete without giving in brief outline at least a survey of the three main branches of the Law of Nations, namely, Peace, War and Neutrality. While the salient features of the Law of Peace are briefly mentioned below, the other branches of inter-state law, namely, War and Neutrality are described subsequently.

CHAPTER II

LAW OF PEACE

INTERNATIONAL PERSONS AND RECOGNITION

An account has already been given of the type and character ot the subjects or persons of inter-state law which existed in ancient India. There can be little doubt that admission to the community of states in those days was by the sole method of recognition. If it is by recognition only and exclusively that a state becomes an international person today,[1] the *Satapath Brahman* would appear to enunciate the principle when it says that a person could become a king, "if he is permitted by others to be so."[2] The application of this principle in actual practice would mean that a king became a king when he was recognised by the community of kings or states and not earlier. The methods and occasions when recognition was granted were varied and some of them may be enumerated below:—

(a) It would perhaps be correct to say that recognition was often granted at the time of international or inter-state assemblages consequent on the performance of sacrifices such as the *Aswamedha, Rajasuya, Yajpeya.*[3] The rulers present at such assemblies and seated or treated according to their status got recognition as equals or inferiors to the host who had invited them.

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1. Oppenheim, *International Law,* Vol. I, 7th ed., p. 121.
2. *Satapath Brahman,* 9|3 2|5.
3. Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India,* p. 22. This interpretation appears to be sound

(b) At the time of warfare the existence of the rival political unit was inevitably recognised as the rules of warfare applied to all belligerents whether equal in status, or inferior or even a vassal in relation to a suzerain.

(c) Again, prior to resorting to war the laws of *Dharmasastra* enjoined resort to peaceful means for settling disputes and during the negotiation stage when envoys or *dutas* of rival political units met each other, recognition followed as a matter of course.

(d) When a state needed facilities in another state for the former's citizens or pilgrims travelling in the latter state, quite often missions or envoys were sent with a political errand and when gifts were exchanged recognition was solemnised.

In short, intercourse among separate political units at one stage or the other brought *de facto* or *de jure* recognition and consequent entry into the community of states that existed in ancient India.

SUCCESSION OF INTERNATIONAL PERSONS

If any inferences can be drawn from state practice and from *Smrti* law, it appears that with the extinction of a state all its rights and duties as a state in relation to other states disappeared. This would appear to be the position when one state was extinguished and another new state came to take its place. However, when there was a constitutional succession of a king arising out of normal or natural causes such as death or absence of the existing ruler, the successor would appear to be generally bound by all obligations created by his predecessor. However, if the change in the person of the king took place as a result of a seizure of power by another or as a result of conquest by a king of another state, apart from general rules relating to the maintenance of the well-being of the citizen body, there would appear to be no written rule which would bind the king to respect the obligations of the extinct state. Thus there could be no question of a succession taking place with regard to the rights and duties of the extinct state. Thus alliance of friendship previously entered into by the extinct ruler would fail. No rules

appear to exist on the succession of contracts or local rights and duties.

JURISDICTION

The jurisdiction of the state in ancient India extended over its territory, a maritime belt not properly defined, as well as over its citizens both within the state and abroad. Jurisdiction over citizens abroad was indeed nominal but there are instances of kings providing facilities for their subjects when travelling on pilgrimage in foreign states and even erecting rest-houses for them with the consent of the king in whose territory such facilities were provided. The example of King Manvendra of Ceylon seeking permission of Samudragupta, the Indian *Cakravartin,* to build a monastery in India illustrates on the one hand the principle of territorial sovereignty of Samudragupta whose consent was essential before a foreign ruler could erect a monastery for his subjects, and on the other the right of the parent state of care and attention in respect of its citizens abroad. Thus there is no doubt that the accepted principle of state law in ancient India was that all persons and things within the territory of a state came under the territorial supremacy of each state which had jurisdiction over them. The logical corollary of the above principle of territorial supremacy was that states were not to perform acts of sovereignty within the territory of other states. Both these principles were recognised in theory and practice of inter-state law and relations in ancient history. The two-fold aspect of state jurisdiction over (1) territory, and (2) individuals comprising the state, may be further examined briefly. (3) Moreover, as we get some glimpses of the Law of the Sea particularly concerning jurisdiction over the maritime belt, a few words may be said on this aspect also.

(i) *TERRITORY*

According to Manu, *rastra* or territory constitutes one of the important limbs of the state. Again, *rastra* (territory) was so important to *rajya* (state) that the two words by usage become synonymous to one another in their connotation. Even

today territory is a *sine qua non* of the concept of the modern state.

The concept of territory in ancient Indian polity included both land and water, *i.e.*, rivers, lakes, etc., and there is authority to the effect that jurisdiction over the coastal sea was also covered.[4] The territorial jurisdiction was complete in every sense and conferred sovereign rights on the king in this regard. Thus no king of a state could in any way make use of the lands of another state without the permission of the latter.

Modes of Acquiring Territory:

(a) *Occupation versus Subjugation*

In accordance with the text of the written law, acquisition of territory was limited to that which was unoccupied in the sense that it was hitherto unconquered or unacquired being *Manusmrti* lays down that it was the duty of the state to protect the lands occupied by it and to search for conquest or occupation of only unconquered or unacquired lands.[5] This should certainly have been possible in ancient India where vast forest regions existed which could be legitimately discovered and occupied by a state and the latter could lay claim over such territories by extending its administration to it. Thus the present-day distinction between occupation and subjugation was not unknown in ancient India.[6] The principal factor of distinction, namely, occupation can only be in relation to a territory not under sovereignty of another state whereas subjugation could only be of a territory previously belonging to another state, was clearly accepted and the *Smrti* writers advocated the former and looked down upon the latter with disapproval.

The enunciation of this principle limiting the field of conquest to unoccupied areas would give the appearance of eliminating the malpractice of waging wars of sheer aggression against

4. *Arthasastra*, II. 28.
5. *Manusmrti*, VII, 99. The word used is "अलब्ध" which stands for "unconquered".
6. Oppenheim, *International Law*, 7th ed. (1948), p. 507.

other states for the sake of expansion alone. Thus, inferentially, it could perhaps be argued that a war resorted to by a state to expand itself by acquiring territories legitimately belonging to another state would violate this salutary principle inasmuch as expansion was being sought not in the direction of unconquered territories but by attacking territories belonging to another state.

As far as actual practice of states was concerned, *Arthasastra* may be quoted as narrating two kinds of expeditions and three modes of acquiring territory.[7] In regard to expeditions mentioned by Kautilya, the first was to be "in wild tracts" and the second in "single village and the like." The expedition in the wild tracts would support Manu's written text of law representing an attempt to occupy unconquered territories and the second category of expedition, namely, in a single village may also satisfy the condition of *Manusmrti* provided the village was not under the control of a state when acquired. The concept of expanding in unconquered regions bears the greatest resemblance to the concept of occupation in modern international law. According to Oppenheim,[8] "only such territory can be the object of occupation as is no state's land whether entirely uninhabited, for instance an island, or inhabited by communities whose native is not to be considered as a state."

Circumstances when subjugation was permitted

Again, *Arthasastra* mentions three kinds or modes of acquiring territory to which also the innocent principle of occupying unconquered areas could be applied without any conflict. Thus territory could be acquired:—

(a) by inheritance, or

(b) by recovering land from the hands of the usurper,

and in both instances, there would be no conflict with the *Smrti* law as the motive behind the acquisition of territory would not be sheer greed or desire for expansion.

(c) The conclusion would be no different in regard to the

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7. Kautilya, *Arthasastra*, V. 437.

8. Oppenheim, *International Law*, Vol. I, 7th ed. (1948), p. 507.

third method when territory is newly acquired by defeating an enemy provided the motive for waging a war was for enforcement of a right or settlement of a dispute and not mere greed of conquest. Thus new territory could certainly be acquired as a peace settlement after the enemy who was guilty of an inter-state wrong had been attacked and defeated. Such types of subjugation would be legitimate and acquisition of territory in such circumstances would appear to be permitted. Thus, there need not necessarily be a conflict between *Arthasastra's* methods of acquiring territory and Manu's principle of limiting the right of conquest to unconquered and unoccupied lands alone.

However, if *Arthasastra* advocated war for the sake of conquest and subjugation as a legitimate method for acquiring territory which aspect may be said to be enshrined in the concept of "*Vijigishu*", it is submitted that the ruler in *Dharmasastra* could certainly not be a party to the same. It would thus be pertinent to point out that there is no uniformity of views or identity of outlook between the king of *Dharmasastra* and the "*Vijigishu*" of *Arthasastra*. The latter would perhaps regard subjugation as a legitimate method of acquiring territory which the *Dharmasastra* would repudiate. It is true, however, that the concept of the kingly office in ancient India included vigilance of the highest order to protect the state from external harm and hence among the duties of king such activities were permitted by Manu as would enable him to keep an advantage over his ally or neutral prince as much as over the enemy. If Manu regarded this as the essence of political wisdom, there could be nothing contrary in it to the general standard of *Dharmasastra* or the idealistic principles of inter-state conduct so long as the king did not resort to violence or warfare without proper cause such as the vindication of a right. The objection taken by Nawaz[9] that such a concept of kingly duty would easily be found in Kautilya's *Arthasastra* is not understood because *Dharmasastra* at no stage permits the Machiavellian statecraft or *Kutayuddha*[10] which Kautilya has advocated as a matter of state policy to attain success rather than as a principle of law to

9. *Indian Year Book of International Affairs*, 1957, Vol. VI.
10. *Manusmrti*, VII. 90.—"न कूटैरायुधैं".

govern inter-state conduct. As far as the latter was concerned, it was the domain of *Smrti* law and not of a work on "power politics". To mistake the latter for a text book of law is to do the greatest injustice to the concept of law in ancient India.

(b) *Cession*

Again, territory could be acquired as a result of a treaty between two states, described in ancient India as *Bhoomi Sandhi.* The ceding of territory by one state to another could be the result of several causes such as a settlement arising out of a war or settlement made to avoid a war. In the latter case, the cessation of territories may take the shape of a gift. This was a common practice of states in ancient India as *dana* (gift) was one of the four *upayas* to avoid war. Again, ceding of territory as a gift could also be the result of a matrimonial settlement which was customary in ancient India.

(ii) *GLIMPSES OF THE LAW OF THE SEA AND MARITIME BELT*

In a country served with some of the great rivers of the world and having a long sea coast, the concept of *Nau Bal* or sea or naval power was not unknown from the earliest days of recorded history. In *Rgveda*[11] (1000 B.C.) there are references to boats and ships as much as we have the account by Megasthenese of the imperial administration of Chandragupta Maurya (321-297 B.C.) during whose reign there was a Board of Admiralty as the first of the six Boards which governed the armed forces of the state.[12] There is also evidence to infer the existence of a commercial basis to naval expansion which is such an important element of sea power today. The existence of foreign trade was thus bound to involve questions of jurisdiction over vessels in Indian ports and the sea surrounding the Indian coast. However, there is no evidence of a concept of the law of the open sea as such.

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11. *Rgveda,* I, 116, 5.
12. Vincent Smith, *The Early History of India.*

Neither Manusmrti nor *Yajnavalkya Smrti* mentions anything about the law of the maritime belt or the jurisdiction which the king could exercise over vessels calling at the ports of the coastal state. However, Kautilya's *Arthasastra*[13] which can certainly be regarded as a good evidence of customary state practice, has a chapter on the Superintendent of Ships wherein certain important principles in regard to the administration of ships involving inter-state relationship have been mentioned. Some of them are listed below:—

(a) *Arthasastra* states that "ships that touch at harbours may be requested the payment of toll." This implies jurisdiction over a foreign ship in regard to payment of customs dues and port dues which right the maritime state of today also exercises. In addition, it also indicates that foreign ships had a right of innocent passage since they were merely touching the Indian port on their way to another state and this right of ingress and egress was not denied to foreign ships as far as the internal waters of harbours and ports were concerned.

(b) Again, the right of the littoral state to capture and destroy pirate ships has been recognised in *Arthasastra* which recites "Pirate ships (*himsrika*) vessels which are bound for the country of an enemy as well as those which have violated the customs and rules in force in port towns shall be destroyed."[14]

(c) Similarly, the coastal state had fishing rights within the nearby adjoining waters of the sea, the limits of which have nowhere been indicated let alone defined. Thus fishermen were asked to give 1/6th of their haul as fees for obtaining fishing licences.

The above principles of state law based upon custom, if not the written text of law, establish beyond doubt the jurisdiction of the coastal state over the internal waters of ports and harbours as well as a part of the adjoining sea the exact limits of which were, however, neither regulated nor defined. It would be incorrect to assume that the king had territorial rights extending over oceans or the open sea which appears to have been

13. Shamasastri, *Kautilya's Arthasastra,* p. 140.
14. *Ibid.*

inferred by Dr. Hiralal Chatterjee in his valuable contribution *International Law and Inter-State Relations in Ancient India.*[15] The text of Kautilya's *Arthasastra* from which Dr. Chatterjee has drawn his inference speaks of the right of the Superintendent of Ships to examine "the accounts relating to navigation not only on oceans and mouths of rivers but also at lakes". The jurisdiction of the coastal state would thus appear to extend to examination of accounts of a commercial nature which would include earnings by trade as well as expenditure incurred on navigation. However, the mere right to examine such accounts cannot confer territorial rights over oceans and open seas as such. There may have been territorial right over an Indian ship on the high seas about which there is no direct evidence but one could possibly draw a legitimate inference from meagre facts available of that age. It would, therefore, perhaps be an exaggeration to conclude that "a state's authority not only extended over rivers and lakes but also over the ocean and by the term ocean Kautilya's reference is to the high seas."[16] Such an inference would run contrary to the interpretation of the word "*Samudra Samyana*" used by Kautilya and commented on by Shamasastry as meaning "sailing or boating close to the shore."[17] It is this limitation of "close to the shore" which gives a clear idea of the recognition of territorial sovereignty and jurisdiction over harbour waters and a coastal sea belt adjoining the shore and distinct from the open sea. By inference jurisdiction over the open sea or oceans as such would appear to be excluded.

In addition to the above-mentioned principles, there are some provisions in Kautilya's *Arthasastra* which have a bearing on inter-state law. *First*, it is provided that, "foreign merchants who have often been visiting the country as well as those who are well-known to local merchants shall be allowed to land in port towns."[18] In the interests of free flow of commerce

15. Dr. Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India*, p. 35.
16. *Ibid.*
17. R. Shamasastry, *Kautilya's Arthasastra*, p. 139.
18. *Ibid.*, p. 141.

restrictions were not placed on the entry of foreign merchants which is something lacking in the comity of nations of today. *Secondly,* it is provided that "passengers arriving on board the king's ships shall pay the requisite amount of sailing fees."[19] which indicates that there were state-owned ships engaged in commerce and that no special immunity attached to such ships. *Thirdly, Arthasastra* has a remarkable rule giving shelter or protection to ships in distress. It is provided that, "whenever a weather-beaten ship arrives at a port town, he (Superintendent of Ships) shall show fatherly kindness to it"[20] This rule would give protection to all foreign ships in distress entering the harbour except ships of the enemy which would certainly be given protection provided they surrendered. It would perhaps not be quite accurate to infer that an enemy ship in distress seeking the protection of a coastal port in ancient India would be treated on the same footing as any other foreign friendly country's ship in distress. Whereas the question of surrendering the enemy character would not arise in the case of a foreign ship of a friendly country, it would perhaps be incumbent on the part of an enemy ship to give up its enemy character and to surrender to get protection of the coastal state. Being an enemy ship, it would be captured as a prize. This perhaps would be the inference from the general trend of the treatment given to enemy aliens as can be gathered from *Arthasastra.* Dr. Chatterjee is right to the extent that there would be no question of molesting the personnel of an enemy ship in distress but it would have to give up its enemy character and ask for protection and surrender to the coastal state. Any inference, as the one drawn by Dr. Chatterjee, to the effect that a weather-beaten ship of the enemy was not to be captured or destroyed even if it did not give up its enemy character would not be warranted.[21] *Fourthly,* the coastal State had some sort of responsibility in regard to vessels which were overloaded. It would be difficult to infer the existence of any loadline regulation which is essen-

19. R. Shamasastry, *Kautilya's Arthasastra,* p. 139.
20. *Ibid.,* p. 140.
21. Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India,* pp. 79-80.

tially a modern feature of navigation but there must have been instances of loss of vessels on account of overloading and hence *Arthasastra* provides that "The Superintendent of Boats shall make good the loss caused by the loss of the boat due to the heavy load, sailing in improper time or place, want of ferrymen, or lack of repair."[22] This would indicate the existence of some sort of rules governing manning of ships, their sailing in proper time and their being loaded in a proper manner. The Superintendent of Ships was responsible to see that the rules on this subject were complied with and the responsibility was so determinedly fixed on the state official as such that if knowingly or unknowingly a vessel sailed without proper manpower or unduly loaded or at an improper time, he had to make good the loss resulting from his omission. It is difficult to infer from the text of the *Arthasastra* whether this rule would apply uniformly to foreign ships as well as to the ships belonging to the state but it does give an indication of the effort of the maritime state to regulate sea transport with a view to making it safe.

(iii) *INDIVIDUALS*

Kane is perhaps right when he observes that in ancient India, the modern sentiment of nationalism had hardly taken root.[23] Though the concept of *Rajya* (state) with its *rashtra* (territory) had fully developed, the inhabitants of the state had no sense of nationality. However, individuals living in the territories of a state constituted, as it were, a citizen body owing allegiance to the king as an embodiment of the state and hence individuals inhabiting a state could not be described as stateless even though they may have lacked the sentiment of nationality as known today. As far as international law is concerned, the legal position of individuals is studied not as subjects of the law which are political units alone, but as the objects of inter-state law, Moreover, in ancient India as today, the link between the state and the individual was based on citizenship howsoever rudimentary the development of that concept may be. If nationality of an individual is his quality of being a subject of a certain

22. R. Shamasastry, *Kautilya's Arthasastra,* pp. 141-142.
23. Kane, *History of Dharmasastra* (1946), p. 136.

state and therefore its citizen, and individuals enjoy benefits from the existence of inter-state law as citizens of a state and not otherwise, there could be little doubt that such a position did exist in ancient India. The individual in ancient India existed as a citizen of the state and in that capacity he had both rights and obligations in relation to the state as much as the latter had towards the individual. However, the municipal law of nationality as to who could be or who could not be a citizen of a state was not properly developed.

Nationality

The primary factor of citizenship or nationality was unequivocal allegiance to the king as the head or embodiment of the state. However, such allegiance could be presumed in several circumstances which may be said to constitute the rules relating to citizenship. For example, there was a recognised distinction between *Svadesiyas* (country's own men) and *Parajana* (foreigners). Thus a son born of a *Svadesiya* would be a natural born subject of the state whose allegiance would be presumed The citizenship of such persons which may be described as their nationality was never in doubt unless they acted as spies and gave up their allegiance to the sovereign for one reason or the other This would give the impression that citizenship could be renounced and a new citizenship acquired. Thus naturalised subjects could also exist and though they may be *parajana* or foreigners in the beginning, they could after some time be treated as *svadesiyas* without any distinction. In this connection, the classic example of Samant Sen is often cited as he settled down in Bengal after having thrown aside his allegiance to the state of his birth and succeeded in establishing a genuine Bengali dynasty of rulers.

Reception of Aliens

The fact that the existence of aliens was common to the state in ancient India, discloses that there must have been constant intercourse within the community of states as such, a condition so essential for the development of inter-state law. The state accordingly prescribed rules as to how aliens were to be treated

The types of aliens permitted to enter the state may be briefly classified as follows:—

(a) There were travellers or *Pathikas* quite often on religious pilgrimage from one state to another and their freedom of movement was generally not denied by the state visited. However, *Arthasastra* mentions the state practice of the Empire of Chandragupta that the arrival of foreigners had to be intimated to royal officials—*Gopas* and *Sthanikas*—who gave the necessary permission to the aliens to stay. This category of aliens was subject to the law of the state during their stay and kept under general supervision. Thus *Megasthenese* mentions that foreigners were assigned lodgings and were generally looked after and given assistance. A watch was kept over them by means of those persons who were deputed to assist them. Moreover, Chandragupta Maurya maintained a Department for foreigners which functioned as a part of the Second Board out of a total of six Boards that were appointed for the administration of the state.

(b) The second category of foreigners who frequented the state belonged to the commercial class comprising foreign merchants and tradesmen who were permitted to land in ports without much restriction. As there was flourishing trade between states in ancient India, the practice of sending spies to other countries was resorted to by paid agents taking the disguise of merchants. It appears that considerable freedom of movement was allowed to merchants in the interest of trade and commerce. In the reign of Chandragupta Maurya, for example, the second Board, as stated earlier, devoted its energies to the cause of foreign residents and visitors and performed duties which would be entrusted to the Consuls representing abroad sovereign powers of today. There is evidence available from the writings of Greek historians that deceased strangers were properly buried and their estates were administered by the Commissioners who took care to forward their assets to the persons who were entitled to them. Vincent Smith[24] comes to the conclusion that, "the existence of these elaborate regulations was conclusive proof that the Maurya Empire in the 3rd and 4th century B.C. was in constant inter-

21. Vincent Smith, *Early History of India* (1924), p 134

course with foreign states and that large number of strangers visited the country on business."

(c) Lastly, citizens of a foreign state were permitted as envoys or members of a political or religious mission and in this capacity could stay for months and often as guests of the visiting state.

All the aforesaid different kinds of aliens except perhaps those who were members of a political mission came under the territorial supremacy of the state and had, therefore, to obey the laws and the rules and regulations of the state they were visiting. The tie of the alien with his home state while visiting foreign states was perhaps fairly remote in the sense that unless there were serious circumstances, the home state would not take notice of incidents in which he might have been involved.

Right of Asylum

It was the right of every sovereign state who felt strong enough to maintain its position among the community of states to give protection to anyone who had surrendered and taken refuge or shelter for the sake of his life. Both secular and sacred literature abound in legends which establish that it was the sacred duty of the king whose shelter any individual took, to protect the refugee or *saranagat* at all times. The *Mahabharata* also speaks of the sacred duty of refusing to surrender a fugitive or a refugee to the enemy.[25]

MACHINERY AND METHODS FOR INTER-STATE RELATIONS AND TRANSACTIONS

The organs of the state and the method by which inter-state relations were established and transactions between states were conducted may be briefly summarised under the following headings:—

(i) The Head of the State supplied the organ which conducted external relations and established intercourse with states.

25. *Mahabharata*, p. 131, Sloka 196.

(ii) The institution of Rajduts or diplomatic missions, envoys, etc., existed in ancient India to conduct inter-state relations.

(iii) Treaties of various kinds including settlement of territories were entered into with a view to registering inter-state transactions.

(i) *HEAD OF STATE*

It is noteworthy that the conduct of inter-state relations in ancient India was entrusted to the highest organ of the state, namely, the King. This was perhaps inevitable when the entire totality of the state as such had to be represented abroad and hence no better organ than the Head of the State was recognised as the most appropriate to give confidence in the community of states as to the authentic and consequently binding character of what was stated or promised in matters affecting inter-state relations. Even International Law today recognises "some kind or other of a Head of the State as necessary" since "without a Head there is no State in existence but anarchy."[26]

The political units of ancient India were not merely monarchical and hence the conduct of inter-state relations in the case of Republics or *Ganarajya* such as the Buddhist Republics, were conducted by the President called the "Raja" and in the case of tribal Republics such as the Malvas or Malloi by the Headman. Similarly, in the case of an imperial organisation which had several vassal states under it conforming to the concept of *Cakravartin*, the conduct of external relations was the exclusive prerogative of the *Samrat* or the *Cakravartin* himself. The vassal states had no right to conduct external relations in defiance of the will of the suzerain. Again, in oligarchy or *paramestya*, it was the Head of State who represented the totality of the political unit in matters concerning peaceful relations among states since this type of political organisation was wedded to *sama* or "peace and quiet".

However, as is the practice today, it was rarely that the king or the Head of State personally came forward to con-

26. Opphenheim, *International Law*, Volume I, p. 675.

duct inter-state relations. He was represented abroad by the institution of *Dutas* or envoys and even within the state lesser matters were attended to by the Council of Ministers of Departments coming under them. Nevertheless, there were occasions when a sovereign met another sovereign with due ceremony and on such occasions the foreign sovereign enjoyed the highest privilege which the receiving state could accord him. This meant immunity from the jurisdiction of the state so long as the foreign sovereign behaved like a king. Though there may be examples of *kutniti* when an attempt to arrest a foreign sovereign may have been made, there can be little doubt about the law on the subject which accorded the highest consideration to the foreign king.

(ii) *THE INSTITUTION OF RAJDUTS*

As the word '*dūta*' essentially stands for a messenger, envoy or negotiator,[27] we may at once accept the contention that there was no permanent institution of ambassadors as we have today. However, a close study of the *Smrti* text would warrant the conclusion that *rajduts* were a regular feature of the state and the institution as such was permanent in the sense that it was a part and parcel of the state machine needed for its efficient functioning particularly with reference to the conduct of inter-state relations. Thus Manu lays down that if the Council of Ministers, the sanction of the armed forces of the state, the treasury and the King were essential limbs of the body politic, the *duta* responsible for bringing about war and peace among states was equally essential.[28] The institution of *dutas* was, therefore, permanent in the sense that no state worth the name could function in ancient India without making full use of it.

In view of the position as stated above, *Smrti* law has dealt at length with several aspects of *duta* or *rajduta* such as his ideal qualities, his functions, his position and privileges, etc. In addi-

27. See the Sanskrit-English Dictionary compiled by Sir Monier-Williams, Oxford University Press, 1956.

28. Manu, VII. 65-66.

tion, there is considerable literature on state practice on this subject. It is, therefore, considered essential to state the *law* first, and then to mention briefly the *state practice* in this regard.

Law

(a) The qualifications of an ideal *duta* have been mentioned in *Manusmrti* as follows:—

दूतं चैव प्रकुर्वीत सर्वशास्त्रविशारदम् ॥
इङ्गिताकारचेष्टज्ञं शुचि दक्षं कुलोद्गतम् ॥

Manu, VII.63.

One who is versed in all the branches of knowledge and is of noble lineage, of pure character, efficient and able to read one's mind through gestures and postures, should be appointed an ambassador (*duta*) by a king. In addition, the ambassador had to be throughout very alert so as to cleverly and correctly interpret the signs, acts and emotions of the king to whom he was deputed. This aspect is brought about by Manu in the following verse:—

स विद्यादस्य कृत्येषु निगूढेङ्गितचेष्टितैः ॥
आकारमिङ्गितं चेष्टां भृत्येषु च चिकीर्षितम् ॥

Manu, VII.67.

With respect to the affairs let the (ambassador) explore the expression of the countenance, the gestures and actions of the (foreign king) through the gestures and actions of his confidential (advisers), and (discover) his designs among his servants.

Again, Kamandaka lays down the following qualifications of an ideal ambassador:—

> "Ability as a good speaker, good memory, oratory, proficiency in arts of war and in the *Sastras, i.e.,* law and sacred literature, and experience and efficiency." (*Kamandaka,* 13, 18.1-3).

Similarly, *Mahabharata* has no hesitation in enumerating the qualifications of an ambassador in *santi parva* as follows:—

> "An aristocrat of noble lineage, orator, efficient in the dis-

> charge of his duties, with a sweet voice and a good memory so as to be able to report speeches verbatim." (*Santi*: 85-28).

Kautilya's *Arthasastra* appears to go a step further in equating the attributes of a good ambassador to those of a minister. It will be recalled that a *duta* endowed with full powers was known as *nisrstartha* if he was *amatyasampad, i.e.,* of the qualities and calibre of a Minister of the Council. Such an ambassador or *duta* had necessarily to be a national of the country and, according to Kautilya, "endowed with powers of persuasion, well-trained in arts, and possessed of foresight, memory, enthusiasm and industry in addition to being in the enjoyment of good physique."[29]

The above qualifications do not form part of inter-state law as such but do reveal the importance which was given to the institution of *duta* and to the selection of the right individual to hold this high office.

(b) The *functions* of a *duta* have also been described by Manu who has laid down that matters concerning war and peace, uniting and dividing states are the principal duties of the *duta* for which purpose alone he is employed by the state.[30]

Apart from *Smrti* law, there is evidence of state practice from Kautilya's *Arthasastra* as to the functions entrusted to a *duta* which are indeed varied and many as can be seen from the relevant paragraph of *Arthasastra* which is reproduced below:

> "Transmission of missions, maintenance of treaties, issue of ultimatum (*pratapa*), gaining of friends, intrigue, sowing dissension among friends, fetching secret force; carrying away by stealth relatives and gems, gathering information about the movements of spies, bravery, breaking of treaties of peace, winning over the favour of the envoy and government officers of the enemy—these are the duties of an envoy (*duta*)."[31]

29. *Arthasastra*, 1-9.
30. Manu, VII. 65-66.
31. Shamasastry, *Kautilya's Arthasastra*, p. 31.

In addition, Kautilya also mentions several other functions some of which may be reproduced below:—

(i) The envoy was to cultivate the friendship of such top-ranking officers as the officers in charge of the wild tracts, of cities and country paths.[32]

(ii) The *duta* was also to make enquiries about military stations, suitable battlegrounds and the routes congenial to retreat. In short, the ambassador in ancient India was to perform the function of obtaining military intelligence including size and areas of forts and the assailable points of the enemy.[33]

(iii) Again, in accordance with the practice recited by *Arthasastra,* the *duta* would have at his disposal the spies despatched by his home state so that he could collect information through this agency. This function is enumerated in the *Arthasastra* in the following words:—

> "He shall, through the agency of ascetic and merchant spies or through their disciples, or through spies under the disguise of physicians, and heretics, or through recipients of salaries from two States (*ubhayavetana*), ascertain the nature of the intrigue prevalent among parties favourably disposed to his own master, as well as the conspiracy of hostile factions, and understand the loyalty or disloyalty of the people to the enemy, besides any assailable points."[34]

(c) In regard to *kinds* of *dutas,* neither Manu nor Yajnavalkya mentions of any categories or classes. However, different categories of *dutas* depending upon the power derived from their sovereign to negotiate with the king of the state visited did exist as we have from *Mitaksara,*[35] a commentary on *Yajnaval-*

32. *Arthasastra,* I.16
33. *Ibid*
34. Shamasastry, *Kautilya's Arthasastra,* p. 30.
35. *Mitaksara,* I.3 :8.

kya Smrti, that there were three such types of *dutas* and these may be briefly described as follows:

(x) A *duta* was regarded as *nisrstartha* when he had the authority of the king to expound the affairs of the state on his own responsibility.

(y) A *duta* was to be regarded as *Samdistartha* when he could communicate to the other king only that text which had been given him by his master. In short, he could not make any alterations on his own accord.

(z) Lastly, a *duta* was *sasanahara* when he carried with him a written text or a communication often described as a royal decree and had merely the authority to pass on this written statement without having anything to say himself.

It was the first type of *duta* who could really be regarded as a fully accredited representative of the state inasmuch as he had full powers of negotiation. His status was equivalent to that of a Minister of the state and the *duta* in full sense of the term.[26] The other two categories of *dutas* did not have full powers and hence they could be regarded more as messengers than as diplomatic envoys. Thus Kautilya describes the second and the third categories as one-half and one-fourth less than the first category of *dutas*.

Caras and Dutas

It would be an error to regard *caras* as coming within the category of *dutas* or *vice versa* because the former word is restricted in its concept to spies and to a system of espionage only. Whatever may be the concept of *Kamandakiyanitisara*[27] in regard to *duta* being a sub-category of *cara*, it must be stated that from the text of the *Smrti* law there would be justification to infer the existence of two separate institutions, namely, that of *caras* who were spies despatched for gathering intelligence and *dutas* who were sent with a diplomatic errand to negotiate a

36. See Altekar, *State and Government in Ancient India*, p. 222.
27. See *Kamandakiyanitisara*, XII.32.

settlement. A *duta* thus had a completely separate function to perform from that of a *cara*. Kautilya used the word *praniti* for *cara* conveying the idea of a secret service. There is no need to confuse either *cara* or *praniti* with *duta* since the functions of the two were quite different. The importance attached to the despatch of a *duta* as compared to the sending of *caras* is clearly revealed from the fact that whereas when a *duta* was sent the brief was prepared after the meeting of a Council of Ministers but when *caras* were despatched no such meeting was necessary. A *duta* in actual practice must have come to hold a high office of respect whereas the *caras* did not hold such position of high esteem. Again, the qualifications for a *duta* were of a much higher standard as compared to those of *caras*. For example, even Kautilya admits that envoys were actually the king's mouthpieces but such an expression could never be used for *caras*.

Dr. Ludo Rocher in his valuable article[38] on "Ambassador in Ancient India" has been in doubt whether the meeting of the Council of Ministers was to precede or to succeed the despatch of *dutas*. It is submitted that a correct interpretation of the text of *Yajnavalkaya Smrti* (Chapter 13, Sloka 328) would lead us to the conclusion that the Council of Ministers was to be held before the despatch of *duta* and after the return home of *caras* and in fact the function of such a meeting was to prepare a brief for the *duta*. As proper intelligence was essential before a *duta* could be instructed in any matter, the meeting of the Council of Ministers was to take place after the return of *caras* from abroad as they came full of information which formed the basis of discussion at the meeting of the Council of Ministers. The text of *Yajnavalkya Smrti* is reproduced below and an attempt has also been made to translate it into English:—

हिरण्यव्यापृतानीतभाण्डागारेषुनिक्षिपेत् ।
पश्येच्चारास्ततोदूतान्प्रेष्येन्मन्त्रिसगत. ॥

Yajnavalkya, Smrti; 13.28.

38 *The Indian Year Book of International Affairs*, Vol. VII, 1958, p 344.

After inspecting the valuables and gold brought in by those deputed for the purpose and after personally getting them deposited in the treasury, the king should give audience to the messengers (*caras*) who come full of intelligence gathered from the other states. After seeing the messengers and obtaining the necessary advices from them the king should dismiss them and see them settled. After this the king should summon the *dutas* (envoys) and see them in the presence of the ministers and after consultations should despatch them (*dutas*) to their assignments.

The Privileges of Duta and the Dignity and Ceremonies attached to his Office

The *Mahabharta,* furnishes the best evidence of the immunity of the envoy or *duta* from both *arrest* and *death* in the country to which he has been deputed. In *Santi Parva,* Bhisma tells Yudhishtra that the envoy was not to be killed in any *calamity* whatsoever. The text of the verse is reproduced below:

> "In no circumstances, O King, should the envoy be killed when he is merely reciting the mission with which he has been entrusted. The King who slays such an envoy is destined to go to hell along with his ministers since he is burdened with the sin which attaches to the killing of an embryo."[39]

Similarly, we have evidence of immunity of arrest which also comes from the mouth of Bhisma who advises King Duryodhana that he should never contemplate the *arrest* of Krsna who had come to the Kaurava court as an envoy of the Pandavas. Bhisma stated in unequivocal language that the arrest of an envoy was against all principles of *dharmayuddha* and hence most condemnable.[40]

Arthasastra goes to the extent of prescribing a statement which could be read out by a *duta* as a matter of state practice if the king to whom he was accredited had been displeased and was going to be on hostile terms with the king of the *duta.* Thus

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39. *Mahabharata,* 12.86.25-26.

40. *Mahabharata, Udyog,* Ch. 88.

Arthasastra states that a displeased enemy could be told:—

> "Messengers are the mouthpieces of kings, not only of thyself, but of all; hence messengers who, in the face of weapons raised against them, have to express their mission as exactly as they are entrusted with, do not, though outcastes, deserve death; where is then reason to put messengers of Brahman caste to death? This (*i.e.*, delivery of that speech *verbatim*) is the duty of messengers."[41]

The above statement was prescribed to be read out verbatim in order to fully apprise the annoyed king that he had no right to assault the *duta*. Thus if the *duta* enjoyed immunity in the state to which he was deputed he was not free from punishment from the home state. Thus both *Ramayana*[42] and *Mahabharata*[43] direct that:—

> "the envoy who conceals his king's thoughts to express his own ideas instead and says things which he ought not to say in his official capacity deserves to be killed."

Some of the punishments prescribed in the *Ramayana* for *dutas* are mutilation of the body, whipping, shaving the head and branding.

The Dignity of the Office

Arthasastra recites the practice of sending a *duta* with due ceremony and in this connection mentions:—

> "Having made excellent arrangements for carriage, conveyance, servants and subsistence, he (an envoy) shall start on his mission."[44]

When the envoy arrived in the court of the king where he was deputed, he was to present a Royal writ in the form of his credentials called *sasana*. •Thus, the *duta* left his country with a ceremony and when he entered the court of the country to

41. Shamasastry *Kautilya's Arthasastra*, p 30
42. *Ramayana*, 6.20.18.
43. *Mahabharata*, 5 70.7
44. Shamasastry, *Kautilya's Arthasastra*, p 99.

which he was accredited, he was also received ceremoniously. Moreover, he carried with him his usual *en tourage* wherever he went.

State Practice regarding Dutas

The use of *dutas* in inter-state relations goes back to *Ramayana* and *Mahabharata* and to the days when sacrifices associated with *Cakravartins* like *Asvamedha* and *Vajpeya* were held. However, more graphic account of ambassadors exchanged between two countries is available during and after Alexander's invasion when negotiations were conducted with the Greek conqueror. Apart from the relationship which developed between the Maurya Emperors and Seleukos, there is evidence of exchange of ambassadors between India and Rome in the early centuries of the Christian era. The evidence of Gentili in *De Jure Belli* is to the effect that "ambassadors from India come to Rome."[45] This is confirmed by the Roman historian Strabo that an Indian Mission came to Augustus Caeser in 20 B.C. for promoting commercial relations between the two countries. This mission may have been sent by one of the Pandya Kings.[46] It is also well known that Asoka sent envoys to Egypt, Syria, Macedonia and Ceylon.

(iii) *TREATIES*

It appears that the prime use made of treaties in inter-state relations in ancient India was for the purpose of registering inter-state transactions particularly connected with territorial disputes. Thus by the very nature of the purpose for which treaties were concluded, they were bilateral in character. Kautilya, therefore, enshrines this state practice when he defines a treaty as "agreement between two kings for mutual surrender or exchange of territories, money and army."[47] Thus multilateral conventions or treaties of the law-making type were unknown in ancient India. The above definition of Kautilya may be said

45. *The Classics of International Law*, 1933, p. 39.
46. Strabo: XV, Chapter IV, 73.
47. *Arthasastra*, VII.1.

to sum up the nature, functions, and parties to a treaty typical of the age.

The binding character of treaties

The institution of hostages was indeed common in India to provide the sanction for the observance of treaties. Thus, when Alexander the Great defeated the tribes of the Malavas and Kshudrakas and the latter entered into a peace treaty with the Greek conqueror, no less than 1,000 hostages were sent by the tribesmen to the Greek camp. It is reported that Alexander dismissed these hostages within a few days of their arrival.[49] Evidence abounds in regard to practice of hostages. Emperor Kaniska is also supposed to have kept hostages in his Court from a Chinese state which had entered into treaty obligations with the Kushan Empire. However, it appears that Kautilya was against this practice in theory at least since he regarded "peace dependent on honesty or oath as immutable both in this and the next world"[50] He observed that the security of hostages was required for this world only in order to strengthen the agreement. Kautilya goes on to state that "in case of any apprehension of breach of honesty" the practice was to make the agreement "by swearing by fire, water, plough, the brick of a fort wall, the shoulder of an elephant, the hips of a horse, the front of a chariot, a weapon, seeds, scents, juice (*rasa*), wrought gold (*suvarna*), or bullion gold (*hiranya*), and by declaring that these things will destroy and desert him who violates the oath."[51] The above would appear to give the impression that the security of hostages was not an essential feature of a treaty inasmuch as it would be rendered invalid in the absence of such a security. This would be the correct interpretation because Kautilya himself states, "honest kings of old made their agreement of peace with this declaration: 'we have joined in peace'."[51] Again, while describing the nature of hostages that could be acceptable, Kautilya makes an interesting observation. He says: "in peace

48. *Cambridge History of India*, Vol I, p. 376
49. Shamasastry, *Kautilya's Arthasastra*, p 341
50. *Ibid*
51. *Ibid.*

made with children as hostages, and in the case of giving a princess or a prince as a hostage, whoever gives a princess gains advantages, for a princess, when taken as a hostage, causes troubles to the receiver."[52] Thus, in the light of the various types of oaths that could be taken to sanctify a treaty and the dangers inherent in certain kinds of hostages, Kautilya could not have meant that hostages were an essential element of a valid treaty.[53]

The existence of the concept of rebus sic stantibus

A treaty could be repudiated in ancient India if the conditions and circumstances under which it was signed had radically changed. Kautilya, therefore, gives an example that if a smaller power was subjected by a bigger one, it was just for the former to repudiate the latter if it subsequently gained power and strength to be able to do so.[54] This could possibly be interpreted as the existence of *rebus sic stantibus* clause in its very rudimentary form at least even though such a concept may be explosive in character.

52. Shamasastry, *Kautilya's Arthasastra*, p. 34.
53. However, Mr. Nawaz holds the view that any interpretation to the effect that a treaty was invalid in the absence of a security of a hostage was plausible. *Indian Year Book of International Affairs*, 1957.
54. *Arthasastra*, VII.17.

CHAPTER III

LAW OF WAR

THE EMPHASIS ON THE LAWS OF WAR IN SMRTIS AND OTHER LITERATURE WITH A BRIEF DESCRIPTION OF ITS WELL-DEVELOPED EXISTENCE IN ANCIENT INDIA

Again, as the ancient political order was more in a state of conflict than at peace, concentrated attention was given to the development of the laws of war which may be regarded as the fourth important distinguishing characteristic of the development of inter-state law in ancient India Though there is some evidence of rights and obligations connected with diplomacy, treaty-making and other aspects of the Law of Peace and Neutrality as mentioned in Chapters II and IV, the information in regard to these branches is, on the whole, meagre compared to the profound literature which exists on the Law of War. It is in the latter sphere that we get a glimpse of the essential unity of civilization inasmuch as Smrti literature goes to the extent of forbidding weapons of war which would unnecessarily aggravate human suffering.[1] The observance of international rules governing warfare presents the greatest difficulty because during belligerency inter-state relations are strained the most while the binding nature of the law is the weakest. Even today there are no courts to enforce breaches of the Law of War committed by the victor. It is, therefore, somewhat strange that of all the different branches of international law, the rules of war should have received so much attention. This aspect has also worried J.D.M. Derrett who poses

1. *Manusmrti*, VII.90 Also see A.23 of the Hague Regulations and Oppenheim, *International Law*, Vol II (edited by Lauterpacht), 7th ed. (1952), p. 340

the question: "What is the significance of the high place which topics connected with war take in the authoritative indigenous literature, while peace plays such an insignificant part in the doctrinal text?"[2] One obvious reason could perhaps be found in the existence of the war phenomenon on such an extensive scale in ancient India that out of sheer necessity it drew the attention of theorists and jurists like Manu and Sukra to regulate war and of religious thinkers and preachers like Mahavir and Gautama to eradicate it A study of history, whether ancient or modern, inevitably reveals that where a wide gulf exists between the theory and the practice of any creed or human institution, whether political, religious or even social, the tendency is for the ideal to be explored, written on and emphasised much more than in circumstances otherwise Hence war-ridden ancient India alone could produce a religion based on non-violence (Buddhism) or the theory of Panch Sheel and the weapon of *Satyagraha* and *Ahimsa* to fight successfully yet peacefully the mightiest empire in the world history Thus, one is prepared to

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2 J D M Derrett, *Indian Year Book of International Affairs*, Vol VIII 1958, p 362

3 Derrett wants an explanation for the fact that while the Hindu world of history was full of violence accepted and even justified on theological and philosophical grounds, the Hindu world of today is accepted as a natural peace making factor a third force in a world torn by conflicting ideologies This is very curious and demands explanation Though it is difficult to agree with the view that on theological or philosophical grounds violence of any kind and at any time was permitted which aspect is discussed later in this chapter the explanation for the abundance of literature and tradition connected with non violence and *Satyagraha* is to be found perhaps in the repugnance resulting from the abnormal growth of the practice of war fare in inter state relations in ancient India However, in theory and law, warfare was never sanctioned unless it was a *Dharmayuddha* meant to uphold the sovereignty of law Again, it is not quite correct to state that there is paucity of sacred literature on peace since that age gave birth to no less than two religions of the world, Buddhism, and Jainism which preach peace alone However, there may be some paucity of literature on the international law of peace which is, of course, quite a different matter

accept the comment of Derrett that "peace was a rare feature in India" but it is difficult to accept the sweeping statement that both sacred and secular literature "patronised by royalty not merely treated war as a normal feature of life but even extolled it as an instrument of policy." It is not disputed that in an age when wars were a common feature, there was bound to be some literature extolling war as an institution but in the face of the principle enunciated by *Sukraniti* limiting the use of force to that occasion only when all known methods and remedies had failed—

उपायानतर नाशेतु ततो विग्रहमाचरेत् ।।

there can be no question of any legal concept in ancient India, let alone the *Dharmasastra*, fostering war-mongering as such. Even in *Mahabharata*, the great 'war book', it is laid down that the king should try to attain victory by measures other than war, for victory through war was of the worst variety.[4] It may be added that though *Mahabharata* is not a part of the *Dharmasastra* as such, yet it propounds the theory of renunciation of war inasmuch as recourse to arms is the very last resort of the just and the wise monarch. It is possible that Derrett may have confused literature on political expediency such as Kautilya's *Arthasastra* with the *Dharmasastra* but even so Kautilya cannot be interpreted to advocate war at all times as he very significantly observes that "the king is to prefer peace when the advantages of peace and war are alike."[5] In any case, literature produced by Kautilya cannot constitute a part of *Dharmasastra*. Moreover, as *Dharma* and *Artha* are often in conflict, Yajnavalkya has specifically laid down that in all such conflicts it is the *Dharmasastra* which will prevail over *Arthasastra*.[6] There can be little doubt that the *Dharmasastra* advocates the principle "securing

4. *Mahabharata, Santi Parva*, 91.1.

5. See Kautilya's *Arthasastra* where this principle is repeatedly enunciated.

6. See, however, Dr. P.V. Kane, *History of Dharmasastra*, Vol. III, p. 8. Though Dr. Kane mentions that *Arthasastra* is a branch

(*Continued on next page*)

peace is more commendable than *rash-war*" and even when it accepts *danda* or use of force—as one of the four '*upayas*' or remedies for the settlement of disputes—the resort to arms had 'in the eyes of *Dharma*' always to be for a 'righteous cause.' The concept of the latter was certainly vague and it may have included something more than 'self-defence', inasmuch as it may have covered the idea of 'self-preservation'. However, if war was ever resorted to as a last remedy, it had always to be regulated and use of force limited in accordance with the recognised rules on the subject. This was a condition in addition to its being always for a righteous cause to be legally justified and be designated as *Dharma Yuddha*. There was thus no element of war-mongering in law or theory of ancient India.

Again, in Manu's *Manav Dharmasastra*, the supremacy of *danda* as implying sovereignty of *dharma* or law is so well established that no Indian with any knowledge of Hindu Law could ever conceive of placing *Artha* and all that it connotes including greed, chicanery and violence, over *dharma*. However, instances could certainly be found of kings in ancient India ruthlessly pursuing *Artha* over anything else, but the existence of

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(*Continued from previous page*)

of *Dharmasastra*, his observation does not refer to Kautilya's *Arthasastra* as such but to the subject of science of polity. As *Arthasastra* deals with the responsibilities and duties of kings, it forms a part of *Dharmasastra* as much as do the duties and responsibilities of individuals in their social, political and religious behaviour. However, Kautilya's *Arthasastra* is a treatise of some importance in the overall literature which exists on the subject of *Arthasastra*. This does not, however, mean that Kautilya's book is a part of *Dharmasastra* as such. No court of law in India has ever accepted Kautilya's *Arthasastra* as a source of Hindu Law and no legal practitioner could ever have quoted this authority for illustrating any principle of Hindu Law. The *Arthasastra* is a remarkable piece of literature on political expediency and when it attempts to prescribe a code of conduct the object is to attain success and not to uphold the supremacy of law at all times. It is a text-book for the ambitious king but it is doubtful if it could be considered a text-book of law.

this fact is like the existence of thefts in all countries of the civilised world despite their national laws prohibiting and penalising such acts. To say the least, in spite of the General Treaty for the Renunciation of War of 1928 and the Covenant of the League of Nations, there have been instances of states brushing aside solemn treaty obligations and resorting to world conquest. Thus, there must be some error in logic or at least in the drawing of inferences and conclusions if Derrett proceeds from the fact which he so repeatedly states about ancient Indian practice that "shame was never felt in attacking and overpowering a weaker neighbour or even remoter ruler,"[7] to draw the conclusion that "there is no sign in Indian history of a force to prevent war, or to sanctify peace."[8] The same inference could perhaps be drawn with greater logic about the world in which we live today or for the matter of that the world or civilization of any clime or time. As far as ancient India is concerned, apart from forces of all times standing for peace alone, the empire of Asoka after the Kalinga war becomes one of the greatest political forces in world history preaching the gospel of peace not only internally but also internationally. The assertion of Derrett that Buddhists and Jains did nothing to restrain warfare and that "in fact Jains provided some of the toughest warriors of the middle ages" is indeed asserting at most half the truth because if Asoka renounced war as all his rock edicts proclaim, it was on account of his embracing Buddhism. A classic example, which comes from Buddhist monks, of restraining warfare deserves to be quoted here. The practice of the principle of non-violence was carried to the extreme limit of surrendering to the enemy rather than resorting to arms when in 712 A.D., facing a foreign invader, Mohammed Bin Kassem, a crowd of Samanis—a Buddhist sect—in Bahraj in Sind, refused to give battle as they stated that they were wedded to the principle of non-violence at all events and in all circumstances. The Samanis contended: "We are Nasik devotees. Our religion is one of peace and fighting and slaying is prohibited as well as all kinds of shedding

7. *Indian Year Book of International Affairs,* Vol. VIII, 1958, p. 371.
8. *Ibid.,* p 372.

of blood." This was the plea made to King Dahir who wanted his subjects to fight Mohammed Bin Kassem.[9] However, human nature being what it is, it may quite be possible to find instances of Buddhist monarchs resorting to ruthless wars as much as the followers of any other faith are quite capable of flouting the teachings of that faith. The mere existence of divergence between the law or theory of war on the one hand and its practice on the other cannot be a ground for the condemnation of the theory itself. Thus, emphasis on the laws of war in ancient India may indicate the existence of widespread warfare in the country but that is no reflection on either the soundness of the law or the political theory of the age. It may at best be a reflection on the enforcement machinery which in the international sphere was lacking then and is lacking today. Thus when evidence from *Dharmasastra* is available to the effect that war was to be despised and resorted to only as the last remedy and its conduct was to be regulated, it would be incorrect to state that the law of the land encouraged limitless warfare which appears to be the thesis of Derrett.

The existence of war in ancient India as an institution both in legal theory and practice must necessarily be accepted. However, at the very outset, it is essential to mention the concept of *dharmayuddha* or *dharmavijaya* as against *kutayuddha* and *asuravijaya*. The concept of *dharmayuddha* or righteous war was based on the following three basic pillars:—

(i) War was resorted to as the last remedy when all other methods had failed.

(ii) The object of the war was just and righteous; and

(iii) Actual fighting took place in accordance with the recognised rules of warfare abstaining from the use of prohibited weapons and refraining from indulgence in illegal practices.

This aspect is rightly brought out not only in *Mahabharata*,

9. Elliot and Dowson, *A History of India as Told by Its Own Historians*, Vol I, p 158. See *Chachnama* also

Sukranīti and *Manav Dharmasastra* but is accepted by Kautilya also.

Thus if the object was righteous and justified being in vindication of a right recognised in law and war was resorted to as the last remedy, it could still be contrary to *dharmayuddha* if the rules governing weapons of war were violated on the battle-field. The existence of all three conditions was thus essential for the conduct of *dharmayuddha*. This is well illustrated by *Mahabharata* itself. The object of the Great War was to uphold a right which existed in Hindu civil law and according to Krsna himself Duryodhana was told that though Pandavas were ready to fight, they were always willing for peace and would do everything to strive for it, which indicates that all known remedies of negotiation and mediation had been resorted to but failed. However, Bhisma was prepared to challenge the nature of the *dharmayuddha* when he stated that Krsna as a charioteer had resorted to arms in the battle-field when using the wheel of the broken chariot to fight Bhisma contrary to a solemn promise given to the Kauravas that Krsna would not take to arms at any stage in the conflict This indicates the extent to which agreements had to be respected in war.

Again, *dharmayuddha* did not mean that war was accepted as an instrument of state policy to be resorted to at all times. If war was admitted as an institution it was only if inevitable and resorted to as an inescapable event to uphold and maintain *dharma* or law itself The acceptance of war as an institution is not denied by even Buddhism since Buddha himself is said to have taught that "he who wages war in a righteous cause after having exhausted all means of preserving peace, is not blameworthy."[10] However, the concept of war carried with it the essential principle that it was resorted to as the very last remedy after every possible method to avoid it had been explored. This aspect has been time and again brought out in *Smrti* texts as well as in *Niti* treatises, and it is important to emphasise it here particularly when the history of ancient India gives the impression that war mongering was rampant in the age. As already mentioned, on more than one occasion, *Mahabharata*

10. Narasu, *The Essence of Buddhism*, p. 43.

enunciates the principle that unjust war was to be renounced and shunned at all times. It is laid down in *Santi Parva* that "it is better to die in righteous war than achieve victory in unrighteous war."[11] The same aspect is reiterated when it is said that "a king should never hanker for victory achieved in unjust war since a king can never win fame by winning a battle by foul means."[12] These principles were based on *Smrti* law which solemnly forbids *kutayuddha* enjoining that "a virtuous king should never engage in unrighteous warfare."[13] However, there may be instances of *kutayuddha* actually taking place as, for example, we have an illustration from *Ramayana* where the *Raksasas* indulged in *kutayuddha* but it was not commendable to honourable men.[14] There are some references in *Agni Purana* also wherein it is laid down that a weaker power may resort to wily or underhand methods when facing a powerful foe and having no alternatives available. A conclusion could, however, be certainly drawn that though some of the *Niti* treatises may permit unrighteous warfare in certain circumstances, the law codes at no time supported it. There is evidence to the effect that as a method of war, *kutayuddha* was condemned to the effect and unfair.[15] It is true Kautilya mentions two kinds of victories arising out of *adharma* or unrighteous warfare. These were *asuravijaya* and *lobhavijaya*. The latter was preferable to the former as it did not involve unrighteous acts such as poisoning of the army or damaging enemy's territory. If war was undertaken for lust of wealth as in *lobhavijaya*, as soon as the weaker power met the demand there was no need for destruction of men and territory and hence *lobhavijaya*, though condemned on account of its motive, was better than *asuravijaya* since the latter involved indiscriminate damage to men and material by foul or illegal means. However, there is no doubt that both were condemned since they were wars of aggression and in this re-

11. *Mahabharata, Santi Parva,* 95.17.
12. *Ibid.,* 96.15.
13. *Manusmrti,* VII.90.
14. *Ramayana, Yuddha Kanda,* 50.15.
15. See also Dikshitar, *War in Ancient India,* pp. 85-90.

gard evidence is available from *Mahabharata* as well as *Niti sastra.*

Apart from Kautilya and *Sukraniti* already quoted before, war as an institution to solve disputes is relegated to the fourth place in the context of the various *upayas* which have been described in *Manav Dharmasastra* to resolve disputes with states. Manu lays down the order of precedence when he quotes *sama* or conciliation as the first *upaya, dana* or gift as the second, *bheda* or causing diplomatic dissensions as the third, and *danda* or force as the last remedy to be resorted to only when all other means had failed.[16]

In short, law limited the circumstances in which war could be lawfully resorted to inasmuch as it had to be for a righteous cause and accepted as the last remedy. The third important factor relating to use of force on the actual battle-field was governed by considerations of humanity On prohibited weapons and practices, both *Manu* and *Sukra* devote several slokas and cover the subject most extensively. It will be sufficient here to mention some of the basic principles and a brief summary of the rules governing warfare is given below.

I OUTBREAK OF WAR

(i) *Prior Notice or Proclamation of War*

A condition of war or *Vigraha* could arise only after a regular ultimatum had been given to the enemy state and a proclamation had been made within the state making preparations for war. Though evidence is scanty, there is reason to infer that a condition of war would not arise between two states unless there was prior notice forthcoming by way of an ultimatum at least. The message sent through the *duta* (Ambassador) was to the effect "fight or submit".[17] It is difficult, however, to state with any precision whether a war would be regarded as illegal in ancient India because it was commenced without a declaration. However, if a presumption is to be drawn from the

16. *Manusmrti,* VII.160
17. Dikshitar, *War in Ancient India,* p 61.

principle that the enemy was not to be taken by surprise and that a sleeping or unprepared combatant let alone a non-combatant was not to be attacked, it could be stated that a war without a proper ultimatum or declaration may amount to attacking and killing enemy forces when they were either unarmed or undressed. The prohibition relating to attacking combatants in a state of unpreparedness is clear as laid down by Manu[18] as well as by Sukra[19] that one who is naked or asleep or unarmed must not be killed. *Mahabharata*[20] also lays down the same principle in *Santi Parva.*

Apart from the above mentioned prohibitions, which would be obviously violated if war was commenced without notice, there was an important customary principle by which the daily combat during the period of the war and particularly the first day's battle commenced after a bugle of warning or *dundabhi* or the blow of conch shell or *sankanada.* In the circumstances, it would not be incorrect to infer that a war fought in accordance with the laws of *yuddhadharma* had to be properly notified either by way of an ultimatum to the rival belligerent or by a declaration of which the belligerent was made aware and in any case the institution of the commencement of hostilities by a *sankanada* or *dundubhi* gave notice to the other side to be prepared for war.

(ii) *Effects of the Outbreak of War*

There is no precise authority or text of *Dharmasastra* laying down the exact effects of war as we study them in textbooks of international law today. By its very nature, however, war must have completely severed the ties between the two belligerent states making intercourse of any kind illegal amounting to high treason against the state whose protection the citizen enjoyed. It is also possible to draw inferences from contemporary writings on state practice. The possible political and legal effects of war may thus be briefly summarised below:—

18. *Manusmrti,* VII, 91 and 92
19. *Sukraniti,* IV 1177-1179.
20. *Mahabharata, Santi*: 100-27|29.

(a) Though there was no permanent institution of Ambassadors in ancient India, there is ample evidence to support the view that there were missions or envoys of one state sent frequently to another and the immediate effect of war would be to close all such diplomatic relations resulting in the immediate withdrawal of the envoy or the mission as the case may be.

(b) Another effect of the outbreak of war would be to put an abrupt termination to all commercial and social relations between the citizens of the two warring states.

(c) It is difficult to state with any precision the effect of war on treaties in ancient India But once hostilities were declared, all previous promises made would not be accepted as binding except to the extent that both the states wished to recognise them on grounds of mutual interest.

II. RULES OF WARFARE

(i) *Weapons of Warfare*

(a) *The principle of fighting like to like.* The most celebrated and well-recognised rule of warfare in ancient India was based on the principle of equation of armed units. *i.e.*, the matching of like to like. Thus, if any army consisted of elephants, horses, chariots and footmen, it was incumbent on each category to give combat to the opposing like category[21] As a result, for example, the elephant force could fight an elephant force only. It would be an illegal practice if elephants or chariots were to attack the infantry. The principle of like matching and fighting the like was based on grounds of chivalry and fairness particularly when armies had several different categories and the employment of the mounted soldier against the unmounted was an obvious act of cruelty to the latter.

(b) *Use of hyper-destructive weapons.* As the distinc-

21. *Manusmrti*, VII 91—न च हन्यात्स्थलारूढं । See also *Mahabharata, Bhisma*, I 29, and *Sukranuti*, IV, 1174 and 1175

"गजो गजेन यातव्यस्तुरगेण तुरगमः ॥"

"रथेन च रथो योज्यः पत्तिना पत्तिरेव च ।
एकेनैकश्च शास्त्रेण शस्त्रमस्त्रेण वास्त्रकम् ॥"

tion between combatants and non-combatants was scrupulously recognised inasmuch as a non-combatant could not be attacked or slain, a weapon which would destroy combatants and non-combatants alike on account of its hyper-destructive power could not be permitted. This has already been brought out before and may be reiterated to illustrate the principle that the entire race of the enemy could not be annihilated by using a weapon which would destroy alike those who had taken arms as well as those who had nothing to do with the fighting. Thus both Lakshmana in *Ramayana* and Arjuna in *Mahabharata* were prevented from using *Brahmastra* and *Pasupathastra* respectively as these hyper-destructive weapons would have caused indiscriminate loss of life particularly when the enemy had not used such weapons and the war was confined to conventional weapons as such.[22]

(c) *Weapons causing unnecessary suffering prohibited.* Manu lays down that weapons of *kutayuddha* must not be used by a king in war and as an example cites arrows having hooked spikes which after entering human flesh would be difficult to take out and arrows with poisoned or heated tips as prohibited in lawful warfare. The *Smrti* text[23] on this important aspect is reproduced below:—

न कर्णिभिर्नापि विग्धै र्नाग्निज्वलिततेजनैः.

Again, *Mahabharata* confirms the existence of this salutary rule of *Smrti* law in *Santiparva* when it states that 'poisoned or barbed arrows should not be used.' (11.13).

(ii) *Objects of Violence in War*

(a) *Military Targets.* In accordance with recognised custom as well as scriptural texts, all places of religious worship, houses of individuals who were not participating in warfare or property which was not in the hands of the armed forces as such, could not be attacked or destroyed by fire or by any other means whatsoever. As a rule, warfare was confined to combatants alone

22. *Ramayana, Yuddhakanda,* VIII. 39, *Mahabharata, Udyog Parva,* 194-12.

23. *Manusmrti,* VII 90.

and hence the target of attack was the combatant force wherever it existed and neither towns nor cities were permitted to be ravaged during war or when armies were on march. Thus a feature of *dharmayuddha* according to *Agni Purana* was to leave the 'fruit and flower gardens, temples and other places of public worship unmolested.'[24]

(b) *Individuals who could or could not be attacked in war.* In regard to individuals who could be attacked during war, a number of rules existed in ancient India to constitute, as it were, a military code to be observed by the soldier on the battlefield. Some of these rules have already been mentioned before, but as they constitute the basic principles relating to warfare they are enumerated more compactly below.

As the *Smrti* text of Manu has sanctity of law, it is mentioned at the very outset. According to Manu, the following individuals must not be slain.

न सुप्त न बिसन्ताहं ननग्न न निरायुधम्
नायुध्यमानं पश्यन्तं न परेण समागतम् ॥

He shall not strike one who is sleeping, who is without his armour, one who is naked, who is deprived of his weapons, one who is only looking on and not fighting, one who is engaged in fighting with another person.

(*Manusmrti*, VII.91)

न च हन्यात्स्थलारूढं न क्लीवं न कृतांजलिम्
न मुक्तकेशनासीनं न तवास्मीतिवादिनम् ॥

He shall not strike from a chariot one who is standing on ground, nor one who is a eunuch, nor the supplicant with joined palms, nor one with loosened hair, nor one who is seated, nor one who says, 'I am yours'.

(*Manusmrti*, VII.92)

Apart from the above conventional law governing inter-state warfare, it may be worthwhile mentioning the embodiment of the same principle in *Mahabharata* and *Sukraniti* which would help to indicate the fact that the law on the subject was very clearly

24. *Agni Purana*, 256.22.

understood and widely known. Thus, according to *Mahabharata*, the following individuals were totally exempted from molestation or any kind of attack:—

न सूतेषु न धुर्येषु न च शस्त्रोपनायिषु ।
न भेरी शंखवादेषु प्रहर्तव्यं कथञ्च न ।।

(*Bhisma Parva*, 1.32)

Never should one attack a chariot driver, animals yoked to the chariot, or pages bringing weapons, or drummers or buglers who announce a battle.

तथा स्त्रियं च यो हन्ति वाल वृद्धं तथैव च ।
विरथं विप्रकीर्ण च भग्नशस्त्रायुधं तथा ।।

(*Vana Parva*, 18.14)

He is unworthy of the *Vrishni* race who kill a woman or a child or an aged man or a warrior deprived of his chariot and in a sad plight with his weapons broken.

Similarly, *Sukraniti* states as follows on the same topic: (*Sukraniti*, IV—1177-1179).

न सुसन्नंविसन्नाहं न नग्नं न निरायुधम् ।
न युध्यमानं पश्यन्तं युध्यमानं परेण च ।।

Nor should be slain one who is over-fatigued, or is bereft of his armour, or is naked or has given up arms, or is a mere spectator or is engaged in fighting with someone else.

पिवन्तं नच भुंजानमन्य कार्याकुलंच न ।
नभीतं न परावृत्त सतांधर्म मनुस्मरन् ।।

A person who is either eating and drinking or is engaged in some other work as also a person who is frightened and is incapable of giving a fight, should not be slain.

वृद्धोवालोन हंतव्यो नैवस्त्री केवलो नृपः ।
यथा योग्यंहि संयोज्यनिघ्नन्धर्मो न हीयते ।।

The old and the youngsters should not be slain and so also is not proper to try to kill the women or only the king. However, there is no infringement of *Dharma* in killing someone while fighting with approved weapons and in complete observance of the laws of warfare.

The enunciation of the principles mentioned above clearly indicates the unequivocal recognition of the distinction between combatants and non-combatants and the freedom of the latter from attack. This important distinction based on the principle of humanity was perhaps more rigidly adhered to in ancient India than by belligerents in World War II This is so in spite of the fact that the distinction between combatants and non-combatants has been a basic principle of modern international law As far as ancient India was concerned, it constituted one of the fundamental principles on which several rules and regulations governing warfare came to be based

(iii) *Acts Prohibited in Warfare*

(i) *Treachery* Night attacks were forbidden by Manu[25] and the use of concealed methods, of fighting employed in *kuta-yuddha* were regarded as irregular, and contrary to the known canons of warfare In fact all stratagems of deceit employed in the interests of success of military operations for the purpose of misleading the enemy were regarded as improper Thus ruses of war were generally discouraged as is gathered by the fact that *"booby traps"* or land mines were regarded as part of *kutayud-dha.*[26]

(ii) Another feature of *dharmayuddha* was the restriction on the armed forces inasmuch as they were forbidden on marches to molest peaceful citizens or to destroy their standing crops In this connection, the observations made by Megas-thenes[27] in 4th century B C are indeed revealing and are repro-duced below

> "Whereas among other nations it is usual in the con-tests of war to ravage the soil and thus reduce it to an uncultivated waste, among the Indians, on the contrary, by whom *husbandmen* are regarded as a class that is sacred and inviolable, the tillers of the soil, even when

25 *Manusmrti,* VII 196

26 K V Rangaswami Aiyangai *Aspects of the Social and Public Systems of Manusmrti,* p 191.

27 Megasthenes, *Fragments.*

battle is raging in their neighbourhood, are undisturbed by any sense of danger, for the combatants on either side in waging the conflict make carnage of each other, but allow those engaged in husbandry to remain quite unmolested. Besides they neither ravage an enemy's land with fire, nor cut down its trees."

(iv) *Treatment of Prisoners of War and the Sick and Wounded*

Prisoners of War were accorded a generous treatment and in the period of the *Brahmanas* they were sent out of the kingdom and permitted to remain on the outskirts. *Mahabharata* records the state practice thus: "Enemies captured in war are not to be killed but are to be treated as one's own children." (*Santi Parva*, 102.32). However, there is some evidence to the effect that the prisoner could be kept as a slave for one year with his consent. He was to be made a free man after the expiry of twelve months. In any case, he was not to be killed. If there were women prisoners of war, they were often induced to marry persons of the conqueror's choice. However, if they declined this offer, they were duly sent back to their homes and given a proper escort.[28] There is state practice also to this effect inasmuch as Krishnadev in the later Vijayanagar period returned the wife of the defeated Gajpati ruler.[29] There is also Kautilya's evidence that Chandragupta Maurya set free prisoners captured in war.

The *Sick and Wounded* were treated equally generously inasmuch as they were sent home or taken to the victor's camp where the wounds were attended to by skilled surgeons. *Mahabharata* lays down the practice that as soon as the wounded soldier was cured, he was to be set at liberty.[30] There is also evidence to the effect that there were women nurses in existence and regular camps were established with medicines and instruments to look after the wounded in the battle-field.

28 *Mahabharata, Santi Parva*, 96.5.

29. Sewell, *Forgotten Empire*, p. 320.

30. *Mahabharata, Santi Parva*, 95.17, 18

चिकित्स्यः स्यात्स्वविषये प्राप्यो वा स्वग्रहे भवेत् ।

III. OCCUPATION OF ENEMY TERRITORY

During the initial stage of military occupation of conquered territory, the rules of warfare permitted the conqueror to meet every kind of resistance from the population with force. However, when the question of final real acquisition of territory came up, every kind of ameliorative method was to be used to win over the population with a view to obtaining their complete allegiance to the new state. Thus *Mahabharata* records the practice that the enemy during the initial stages was entitled to destroy the enjoyable commodities in order to obtain unquestioned allegiance to the conqueror. Similarly, Kautilya permits the conqueror in danger in enemy occupied territory to resort to pillage and destruction[31] but this could hardly be the rule since there is evidence to the effect that the occupied territory was to be treated more favourably than the original territory of the state. For example, the following practices and rules in connection with the enemy occupied territory may be quoted:—

(a) The defeated king was to be reinstated on the throne but if he had succumbed in the battlefield, his son or nearest relation was to be installed on terms of subordinate cooperation with the conquering state This was prescribed by *Smrti*[32] law.

(b) The vanquished citizens were permitted to retain their own laws and customs.

(c) *Mahabharata* suggests that the chief leaders of the defeated people were to be conciliated by "soothing words and alluring presents."[33] In this connection, it may be worthwhile mentioning the *Smrti* text which is based on *Mahabharata* as well as Kautilya's *Arthasastra*. Manu says:

जित्वा सम्पूजयेद् देवान् ब्राह्मणांश्चैव धार्मिकान् ।
प्रदद्यात्परिहारांश्च स्थापयेद भयानि च ।।

31. *Arthasastra*, 13.4.
32. *Manusmrti*, 7, 202.
33. *Mahabharata, Santi Parva*, 96.12.

'After conquest he should make lavish gifts of land, gold and other valuables for the worship of *brahmanas* and gods of the occupied territory and dispel the fears of the people of the area.' (*Manusmrti*, 7.201).

(d) *Manusmrti* also states that the customs and administrative institutions of the enemy occupied territory should be allowed to remain intact even if they were not quite in conformity with the institutions of the conquering country.[34]

(e) According to *Mahabharata*, the ultimate objective of the king in the enemy occupied territory was to give the latter efficient government and as long as this could be achieved with the least possible disturbance by recognising someone from the conquered territory itself as the vassal ruler, there was every reason to encourage that practice as it would avoid mass rebellion which may be difficult to quell. It is well known that Samudragupta followed this practice and the *Daksinapath* rulers whom he captured in his wars were set free and the *Atavika* kings were admitted to the service of the conqueror. There were several chieftains who acknowledged the allegiance of the emperor and paid tribute to him.[35] The internal system of administration in such circumstances was left completely undisturbed. In fact, the concept of *Cakravartin* itself fostered the principle of overlordship and as long as the conquered monarch accepted the suzerainty of the conqueror the territories of the former were left intact along with their social, political and cultural institutions.

State Practice

As far as state practice is concerned, we have the classic

34. *Manusmrti*, 7.203.

35. See *Gupta Inscriptions*, No. 1. PL. 1.1.19.

example of Alexander in relation to Poros or Porus about which a reference has been made before. In this connection, it may be relevant to reproduce the observation of Gentili in *De Jure Belli* when he refers to the treatment meted out to Poros after Alexander had defeated him in the battle of Hydaspes in 326 B C Gentili observes:

> "When Porus, the most famous of Indian Kings, was taken by Alexander and was asked what he wished Alexander to do with him, he replied that he wished to be treated like a king; being then asked what also he desires, he rejoined that everything was included in that speculation"

The above observation is a proof positive of the fact that the treatment meted out to the king after he was defeated and his territories were lost to the victorious ruler, was quite different from the treatment meted out to other personnel of the defeated foe. It is also significant that Porus should have demanded to be treated as a king in accordance with the accepted state practice based on *Smrti* law which was that he should be restored to his territory and this Alexander agreed to do.

CHAPTER IV

LAW OF NEUTRALITY

If wars are as old as the birth of the state itself, the concept of neutrality in its very broadest aspect implying either indifference or disinterestedness as against sympathy and active participation in the conflict between two or more belligerents, cannot be said to be in any way less old. However, it would not be warranted to draw an inference from the mere existence of indifferent states not participating in the conflict that there existed a regular law of neutrality as such. There is no doubt that several words such as *udasina* or *asana* or *madhyam* or *nairapeksya* have been used both in *Smrtis* as well as in *Niti* texts which appear to convey the concept of indifference of a state to a struggle between two or more states. It may nevertheless be difficult to infer from such words the existence of a regular law of neutrality. It is unfortunate that different meanings have been attached to these three words by different scholars which has caused a certain amount of confusion. It may be worthwhile examining these words in a little more detail before concluding that the concept of neutrality in its broad basic aspect existed and to some extent developed on account of constant warfare a feature of the age of which a mention has already been made before.

"UDASINA"

The word *udasina* has been translated by Dr. R. Shamasastry as *neutral*.[1] It is a word which is used in propounding the *mandala* theory and in that context Dr. N.N. Law has attached

1. Shamasastry, *Kautilya's Arthasastra*, 3rd Ed., p. 291.

a slightly different meaning to it when he has said that the word represented "the strongest power we have to imagine within the first zone of the central state."[2] Kautilya's *Arthasastra* also uses the word *udasina* for a power which he regards as capable of helping the enemy or the *vijigisu* and the *madhyama* kings together or individually or in resisting any of them individually. This implies that the *udasina* state was the strongest political unit in the *mandala.* Nevertheless, the basic concept underlying *udasina* is certainly one of indifference or disinterestedness which gives an idea of neutrality. If *Kamandakiya Nitisar* is to be relied upon, *udasina* would be a state outside the *mandala* and *Agni Purana* would appear to substantiate the same.[3]

However, there is also the use of the word *udasina* in *Manusmrti* where the context is throughout that of friend and foe. In that general background, the use of the word *udasina* would convey the only other attitude of a state which is that of a neutral For example, the word *udasina* has been translated by Burnell as neutral and he has been supported by Jha. The English translations of both these verses are given below:—

> "155 (Let him) strenuously (watch) the behaviour of (a king of) middle position, and the attempts of (an aggressive power) desirous to conquer, the conduct of one who is neutral, and of (his) enemy.
>
> 158. A king should know the next (king to him to be) an enemy, as also the adherents of (that) enemy; the (one) next to the enemy (to be) a friend; the one beyond both (to be) neutral."
>
> [*The Ordinances of Manu* by the late Arthur Coke Burnell (1891), p. 168.]
>
> "155. On the conduct of the 'intermediary' on the doings of the king beset upon conquest, on the action

2. N.N Law, *International Relations in Ancient India,* Part I, pp. 10, 11 and 13.
3. Kane, *History of Dharmasastra,* Vol III, p. 220.

of the neutral king, as also that of his enemy, with special care.

158. He shall regard, as 'enemy', his immediate neighbour, as also the person who helps his enemy; the immediate neighbour of his enemy he shall regard as his 'friend'; and as 'neutral' the king who is beyond those two."

[*Manusmrti* translated by Ganganatha Jha (1924), Vol. III, Part II, pp. 375-376.]

Thus the word *udasina* may be said to represent three basic ideas, namely, first a state at a height, second a state at some distance, and third a state indifferent and hence neutral in the context of the relations of the *vijigisu* who has to analyse which state is a friend and which state is a foe. Dr. Dasharatha Sharma who has examined very minutely the political term *udasina* has also come to the conclusion that neutrality must be regarded as "so common a characteristic of the *udasina* state that Kautilya lays down the general rule that 'to help an *udasina* and military forces in return for money is an undertaking that leads neither to good nor bad after-effects'." It is argued that had the word *udasina* signified merely a strong state that would normally have an unfriendly attitude towards the *vijigisu*, military help of this sort would be extremely risky; it might render stronger a potential enemy who is already strong enough. Thus, "a first-class *udasina*, as stated by Manu, was *sthula-laksa, i.e.*, one who always tolerated the prosperity of the *vijigisu*." The reasoning of Dasharatha Sharma is convincing and it is, therefore, difficult to agree with the views expressed by Dr. Hiralal Chatterjee that *udasina* "does not refer to a neutral king."[4] In the circumstances, neutrality may be inferred from the word *udasina* but there are no set rules laid down to govern the conduct of a neutral state and the basic principle of impartiality which symbolises neutrality is not so conspicuously brought out as it may be said to be present in the international law of today.

4. Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India*, p. 131.

"ASANA"

Again, the word *asana,* which according to Dr. Hiralal Chatterjee stands for indifference or inactivity in the context in which Kautilya[5] has used it, has been defined in the Sanskrit-English Dictionary by Sir Monier Monier-Williams, as follows:

> *"Asana.* (but asana, SBr.), am, n. sitting, sitting down, KatySr.; Mn.; sitting in peculiar posture according to the custom of devotees, (five or, in other places, even eighty-four postures are enumerated; see padmasana, bhadrasana, vajrasana, virdasana, svastikasana: the manner of sitting forming part of the eightfold observances of ascetics); halting, stopping, encamping; abiding, dwelling, AV. 127, 86 Mn., Yajn.; Hit. &c.; seat, place, stool, KatySr.; SBr. xiv; Kum.; Mn. &c.; the withers of an elephant, the part where the driver sets, L; maintaining a post against an enemy;..... "

Similarly, *asana* occurs in several places in *Manusmrti* and *Yajnavalkya Smrti.* As far as *Manusmrti* is concerned, both Burnell and Jha have translated it as standing for "encamping" or "halting". The Sanskrit texts of the slokas along with their English translation is given below:—

सधि च विग्रह चैव यानमासनमेव च ॥
द्वैधीभाव मश्रय च षडगुणाश्चिन्तयेत्सदा ॥ 160 ॥
सधि तु द्विविध विद्याद्राजा विग्रहमेव च ॥
उभे यानासेन चैव द्विविध: सश्रय: स्मृत: ॥ 162 ॥
क्षीणस्य चैव क्रमशो देवात्पूर्वकृतेन वा ॥
मित्रस्य चानुरोधेन द्विविध स्मृतमासनम ॥ 166 ॥

"160. He should ever think of the six tactics of (a king), alliance, war, marching, encampments, stratagems, and recourse to protection.

162. But a king should know that alliances (are) of

5. *Arthasastra,* VII.1.

two kinds (as is) also war; both marching (and encampment) also, and stratgem; and recourse to protection (is) also said to be of two kinds.

166. Encamping is said to be of two kinds; (first) when the king is by degrees weakened by chance or by former deeds, and (second) to help any ally."

[*The Ordinances of Manu* by the Late Arthur Coke Burnell (1891), pp. 169-170.]

"160. Alliance, war, march, halt, bifurcation and seeking shelter—These six measures of policy he shall constantly ponder over.

"162. But the King shall know that alliance and war are of two kinds; so also both marching and halting; and seeking shelter also has been declared to be of two kinds.

166. Halting has been declared to be of two kinds: (1) that which is necessary for one who has become gradually weakened, either by chance or through previous acts, and (2) that which is necessitated by considerations for his ally."

[*Manusmrti* translation by Ganganatha Jha (1924), Vol. III, Part II, pp. 376, 378 and 380.]

However, Dr. Kane, while describing the six *gunas*, namely, *sandhi* or agreement; *vigraha* or hostile attitude; *asana* or an attitude of indifference; *yana* or preparation; *samsraya* or taking shelter; *dvaidhibhava* or making peace with one king and adopting hostility towards another, has definitely indicated that *asana* stands for indifference and neither for encamping nor for halting. In the context of the six aforesaid *gunas* if we accept that *asana* stands for indifference it would appear to convey the idea of neutrality taking into consideration the context in which it is used. The translation given by Dr. Hiralal Chatterjee of sloka 166 of Chapter VII of *Manusmrti* would

in that event appear to be more appropriate. As Manu is describing the six *gunas* of which *asana* is one and according to Dr. Kane it symbolises indifference or neutrality, the following translation of Dr. Hiralal Chatterjee would be in conformity with Dr. Kane's interpretation as well as in accordance with the definition of *asanam* given in *Amar Kosha* which is "*vigarahadinivittih* or abstention from war."

> "*asana* is of two kinds: when a king is forced to adopt a policy of *asana* (neutrality) owing to some irony of circumstances or owing to his bankruptcy resultant from misdeeds committed in his previous birth, we have one form of it: we have the other form when a king adopts a policy of neutrality being so requested by another king."[6]

The above text of *Smrti* law conveys the fact that neutrality had to be adopted by certain states either because they were weak and in a state of decay, and hence there was no other course open to them, or because they were requested by a friendly king to adopt a policy of neutrality. Thus the sympathies of a state in *asana* may still be with one or the other belligerent and hence the basic requirement of neutrality which is impartiality may only be present in its outward form.

"*NAIRAPEKSYA*"

The third word which also connotes neutrality is *nairapeksya*. This word has been used by Kullukabhatta and clearly stands for an attitude of impartiality adopted by a state towards another in conflict.[7] However, in actual state practice, it was not usual to proclaim neutrality on the outbreak of a war or at any period during the conflict. There are also no set rules governing inter-state conduct where a neutral was involved in relation to belligerent states. The one clear exception to the above statement would perhaps be the prohibition on trade in articles such as arms and ammunition, weapons, chariots, jewels,

6. Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India*, p. 132.
7. See *Commentary of Kullukbhatta on Manu.*

etc.[8] It is also well known that Kautilya did not favour any trade between the neutrals and the enemy and regarded it as an offence. An individual carrying weapons and explosives was to be imprisoned and ships carrying similar commodities were to be confiscated which indicates a prohibition on trade of contraband goods. Dr. Chacko, however, holds the view "that the traders in the belligerent territories were allowed to carry on their normal activities unless their trade was considered detrimental to the conduct of the war."[9]

CONCLUSION

In the light of the contemporary authorities quoted above, it could be stated that as far as the theory of inter-state law was concerned, there was a distinct place for so-called neutral states who were not interested in any particular clash of arms between states at any given time. In fact, accounts of diplomacy and statecraft of the period reveal that there were circumstances in which a state had to show complete indifference to a war waged between two or more neighbouring states Thus the concept of neutrality was unknown neither to inter-state law nor to diplomacy and statecraft. It may not have been as clearly well-defined as it exists today but for reasons of necessity the state in ancient India which did not wish to participate in a war had to show complete impartiality to all the belligerents else it would open itself to attack by one of them. It could, therefore, be argued that impartiality which is the basic principle of neutrality did exist in some form or other. The exact rules governing impartiality may not have been clearly defined but each state choosing to remain neutral would have to judge to what extent it could deviate from impartiality without courting attack from one of the belligerents. It would perhaps be difficult to state more than this on the meagre data which is available of ancient Indian history.

8. *Arthasastra,* II.28.
9. *Recueil Des Cours,* 1958, Vol. I. p. 139.

Mediaeval India

CHAPTER V

INTRODUCTORY

CONCEPT OF THE LAW OF NATIONS IN MEDIAEVAL INDIA

As the history of mediaeval India is one long narrative of the contact of Islam with *Aryavarta* and the conquest of the latter in gradual stages, no study of inter-state law of this period can be complete without a close examination of the theory and practice of Islamic law and jurisprudence along with that of *Aryavarta.* As Islam and *Aryavarta* represented two distinct civilizations, a study of the rules regulating the intercourse of the political units of these two groups in the middle ages would involve a study of the distinguishing features of the legal systems of both. The special features of ancient *Aryavarta*[1] having been mentioned in Part I, a brief account of Islamic theory and jurisprudence follows.

(i) *The distinguishing characteristics of Inter-State law in Islamic theory and jurisprudence*

The concept of the Caliph as the head of *Dar-al-Islam* and the belief that Islam should be a universal faith based on conquest and proselytization could not have been conducive to the development of the law of nations or states as we know it today —a heritage of the West. In strict theory at least, the existence of the aforesaid two basic ideas would not warrant a

1 The term *Aryavarta* is used to connote the civilization which was established on the Indian sub-continent prior to the advent of Islam in these parts.

treatment of equality or uniformity between an Islamic state and a non-Islamic political unit. In order to appreciate this position, which is fundamental to the correct understanding of the concept of inter-state law in the mediaeval Muslim world, the distinguishing characteristics of the general political organization of Islam as mentioned below deserve attention.

(1) The position of the Caliph as the head of the Islamic world endowed with full powers to administer and enforce the divine law would not appear to furnish a fertile ground for the growth of sovereign states having inter-state relations amongst themselves, since, in theory, the legal status of the Islamic political units was akin to that of provinces of a unitary state rather than that of autonomous units of a federation. This was the position within the Muslim world, let alone developing inter-state relations with states outside the Muslim world, which could exist only in derogation of the ideal of universal Islam, to be discussed subsequently The concept of the Caliph was, therefore, somewhat akin to the concept of *Cakravartin* in ancient India and, in some respects, even wider, as it stood not only for political supremacy but also for theocratic overlordship; this latter aspect was absent in the concept of *Cakravartin.* At most *Cakravartin* stood for Caesar alone while the Caliph was both Pope and Caesar combined in one Thus from the view-point of the growth of inter-state law as known today, the concept of the Caliph would appear to be a greater obstacle in the middle ages than the concept of *Cakravartin* could possibly have been in ancient India The political units which sprung up during the early Islamic expansion owed allegiance to the Caliph, at least in theory if not in practice. It was many centuries after that "the power of the sword by which the Prophet sought to win converts to his teaching, was turned against Islam itself."[2] In

2 E B Havell, *History of Aryan Rule in India,* p 279 Havell is perhaps not quite accurate when he says that the Prophet himself sought to win converts by the sword since it is well known that he never fought foreign wars except on two occasions—once when he was compelled to do so consequent to assassination of his envoy to the court of Busra and the second when he invaded Tabuk, which was a defensive measure under

(Continued on next page)

matters of Imam or faith, the Mussalman may have bowed to the ruling of the Caliph, but in the distribution of 'worldly goods' which his own sword had won, he claimed the "freedom of the true believer." Thus the practice tended to depart from the theory and soon distinct political units such as those in India came to establish their sovereign rights when the ties with Baghdad weakened and ultimately snapped. However, the growth of inter-state relations in the earlier Islamic history is somewhat *sui generis*, being on a pattern of its own without a parallel.

(2) The basis of the "Muslim Law of Nations" is the relationship which, according to the divine law, governs the conduct of Muslims with non-Muslims. There is no separate place assigned to the Law of Nations as such in Islam. The *Quran* certainly deals at length with the various aspects relating to the behaviour of a 'believer' in his relations with 'believers' and 'non-believers'. This concept, essentially based on individual relationship, is without hesitation or alteration extended to govern inter-state relationship in Islamic jurisprudence. It is difficult to state whether the practice was for the good or the worse, but, on the whole, it could certainly be stated that while a believer may hate a non-believer in his individual capacity, it is doubtful if states could do that so conveniently. It may be mentioned that this practice appears to be in accordance with the very latest trend, namely to make the individual the subject rather than the object of international law and thus to widen the scope of international law as well as its effective field of application. However, the merit of the Islamic rule which went to the law of the individual to obtain inspiration for inter-state law was, to some extent at least, lost because of the pre-eminent position of the rule in the classical law which did not tolerate the existence of any state other than the Islamic state, thus upsetting the basic concept of the Family of Nations.

(3) Another characteristic having a bearing on the deve-

(*Continued from previous page*)

taken to counter an overwhelming and immediate danger of an attack by the Byzantine Emperor *See* in this connection, Mohammad Ali, *Religion of Islam*, p. 560.

lopment of inter-state law in Islamdom was the basic assumption that the law bound individuals rather than territorial groups. Thus Muslims wherever they went were under the jurisdiction of the Islamic state, as jurisdiction in Islam was based upon the 'personal' rather than the 'territorial' principle. This approach was bound to conflict with the development of inter-state law in so far as every state has a territory and exercises jurisdiction over its nationals and the concept of the latter has primarily been territorial. However, as the ruler of an Islamic political unit, who was more often than not a monarch, was also bound by the Islamic law and movement beyond the territories of a state without the monarch in command was rare, this lacuna need not be exaggerated, particularly in an age when jurisdiction could be personal also.

(4) The "Muslim law of nations", according to Khadduri, "recognizes no other nation than its own, since the ultimate goal of Islam was the subordination of the whole world to one system and religion, to be enforced by the supreme authority of the imam"[3] The aim was thus "the proselytization of the whole of mankind"[4] Such a concept inevitably came into conflict with the recognition of non-Muslim communities since their co-existence could not be tolerated, at least in theory if not in practice In regard to Islam as the only faith of the universal state, it may be mentioned that it furnished an ideal which might never be attained but always striven for The history of inter-state relations so far as contacts of Islamic states with non-Islamic states are concerned is, therefore, one of constant warfare, since by conquest alone could conversion to Islam be obtained rapidly Thus the distinguishing characteristic of the classical law of Islam governing inter-group relationships is the enunciation of the doctrine of *Jehad* which makes a remarkable contribution to the theory of Islamic jurisprudence. Attempts to enforce it in the practical field have given birth to an equally rich variety of incidents which could be regarded as formulating some of the basic principles of state practice *Jehad* in general

3 Majid Khadduri, *War and Peace in the Law of Islam*, 1955, p 44
4. *Ibid*, p 45.

means a "holy or religious war", and stands at the apex of all legal norms in the classical law of nations in Islam. Thus in the early period of Islamic history when conquest and expansion were the order of the day, inter-state relations hinged on this doctrine to such an extent that an attempt to describe *Jehad* in theory and practice would be to almost summarize the Islamic Law of Inter-State relationships.

(5) As a deduction from (4) above, it may be pointed out that as the ultimate aim of Islam was to win the whole world and since this could not be achieved immediately, there was inevitably a temporary character imparted, in theory at least, to the Muslim law of nations in so far as it had to deal with non-Muslims for such time only as the latter category existed. It would, therefore, be correct to infer as Khadduri has done that "if the ideal of Islam were ever achieved, the *raison d'etre* of the Muslim law of nations, at least with regard to Islam's relations with non Muslim countries, would be non-existent."[5]

(ii) *Islam and Aryavarta in Mediaeval India*

There is no need here to describe the code of conduct which governed the political units of mediaeval *Aryavarta* at the advent of Islam since it is well known that throughout the Rajput period of Indian history the ancient Hindu laws as narrated in the *Sruti* and *Smrti* continued to be respected. From the days of King Dahir of Sind (700 A.D.) and Prithviraj Chauhan of Delhi (1190 A.D.) till the death of Aurangazeb (1707 A.D.), the last of the great Moghul Emperors, despite the fact that some of the Rajput states in alliance with the Moghul Emperors may have imbibed Moghul court traditions and some of the cultural traits characteristic of Islam, there is little doubt that these states were still bound by the Hindu code in their personal relationships as well as in their inter-state intercourse. The inter-state law prevalent there in pre-Muslim times would continue to bind the Hindu political units of mediaeval *Aryavarta* and particularly so since the concept of inter-state law in ancient India was one of universality of application irrespective of civilization and creed.

5. *Ibid.*, p. 44.

However, the political units of Islam which came into existence under the Caliph continued to be guided according to *Quranic* theory and practice. In short, therefore, a distinguishing feature of the position of inter-state law in mediaeval India is the absence of a uniform set of rules which would govern both types of political units, whether Aryan or Islamic. The modern concept of international law is essentially based on one uniform set of rules which would govern all without discrimination. For instance, the Geneva Conventions of 1949 have a universal application irrespective of considerations of different civilizations or opposing political ideologies of different states. This could not be said of mediaeval India, which became a battle-ground of two civilizations, each having its own laws to govern inter-state conduct. The only example we have in the West is that furnished by the crusades when Christendom came into conflict with Islamdom and those two different faiths with their own distinct concepts of law clashed. However, the crusades of the West were short-lived in comparison to the wars of conquest and religion, which were a feature of mediaeval India from 712 A.D. to 1707 A.D. Again, much less short-lived than the phenomenon of the crusades was the Greek invasion of ancient India which was indeed a fleeting episode of history and did not bring out the problem of a conflict of legal systems consequent to a conflict of civilizations After a few battles, the Greek political units on the borders of India came to live peacefully with the political units of ancient India on the basis of reciprocity and co-existence. The same could not perhaps be said of mediaeval India during the early stages of Islamic expansion but subsequent history reveals the acceptance of the principle of co-existence, particularly in the reign of Akbar (1556-1605 A D.), even if this may have been on individualistic basis. It is well known that Akbar enunciated the principle of complete toleration in his dealings with the subjects of his state, whether Muslims or Hindus. He elevated the position of the *zimmi*, exempted them from *jizia* and other poll taxes and his Rajput policy was directed to subjugate rather than annihilate the Rajput principalities which helped him elevate his own position to that of suzerain over-lord of the region.

Even in the case of Mewar where he came into conflict at first, Akbar relented in the later part of his reign to accept the independence of Mewar and thereby confirmed that co-existence was not incompatible with his imperial theme. Akbar's aim may have been political, but his successor Aurangazeb was inspired by the fervour of a religious war both against the heretics of Deccan and the non-believers of North India and in undoing the policy of Akbar he undid the Empire itself. Though much can be said on this subject, it should suffice to emphasise here the problem posed to the student of inter-state law in mediaeval India: which law, Islamic or Aryan, would prevail in warfare and which one would govern the relationship of the two types of political units in times of peace ? This aspect is further discussed when dealing with the basis of inter-state law in mediaeval India.

BASIS OF INTER-STATE LAW IN ISLAMIC THEORY AND ITS APPLICATION TO MEDIAEVAL INDIA

(i) *Consent or Divine Command*

The consent of states or groups could not be the basis of inter-state regulation in Islamic jurisprudence since the source of all laws was the divine command as enshrined in the *Quran*. Mohammad Abd Allah Darz of the Al Azhar University sums up the position when he says: "The *Quran*, the word of God, is perfection itself—it is unchallengeably true, infallibly just."[6] There is little doubt that this belief dominated all periods of Islamic history and continues to influence the trend even today. It is on record that even as late as 1945 the Delegations of the (Muslim) states of the Middle-East at the U.N. Conference on International Organization, reported that the "legal rules in the *Quran* and *Sunna* (Tradition of Muhammad) stem from the divine command."[7] The position in mediaeval India thus appears to be analogous to that in ancient India where *Smrti* law was founded upon 'divine revelation'. Thus the basis of inter-state law

6. Mohammad Abd Alla Darz, *The Origin of Islam*, p 79.
7. *United Nations Conference on International Organization, Documents*, Vol. XIV, pp. 375-379.

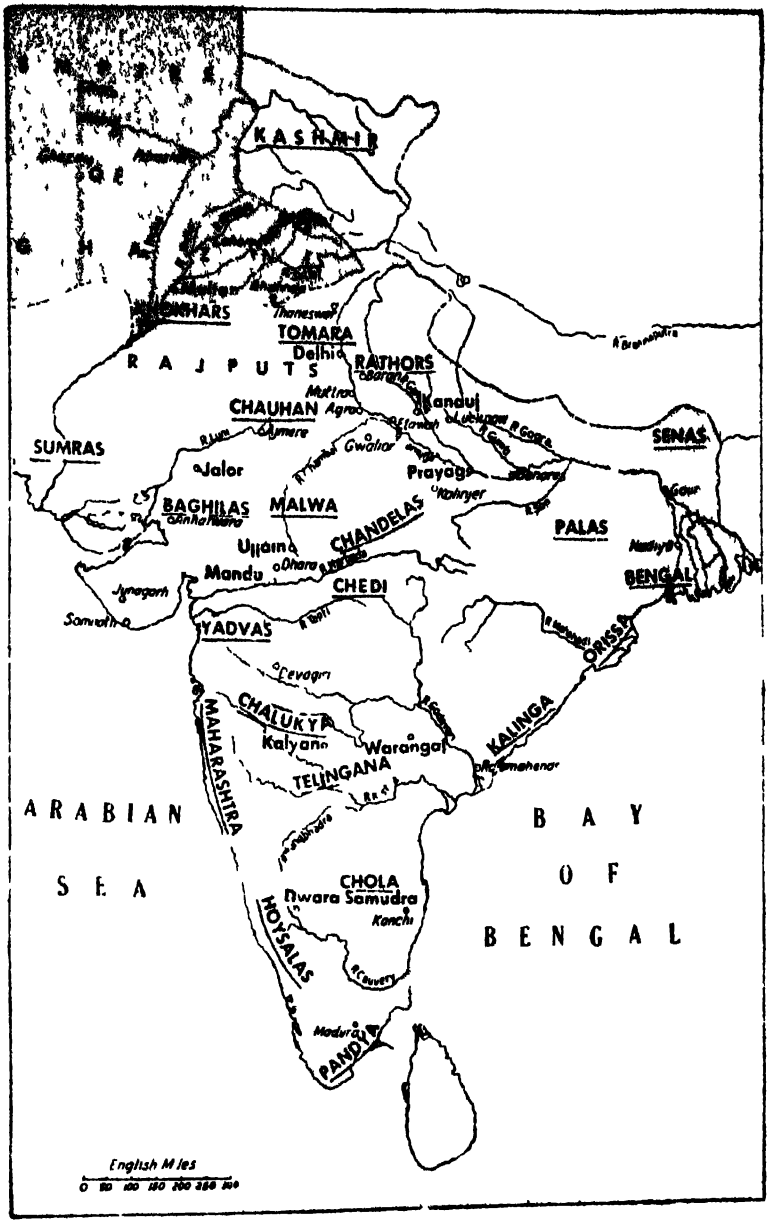
as found in the *Quran* is the sanctity of the divine text of the law as given out by Muhammad in his capacity as God's messenger on earth.

However, in actual state practice, since treaty law did develop in the course of centuries not only between Islamic states *inter se* but also with non-Muslim states, it may be inferred that eventually consent in some form or the other lay at the root of these treaty obligations. Nevertheless, the inspiration to respect the word pledged in the treaty came sure enough from the *Quranic* verse or Sunna, the latter representing the practice of Muhammad.

Furthermore, as the existence of customary law which has consent as its basis is conspicuously absent in the strict theory of Islamic law, including inter-state regulations, it would not be wrong to infer that the element of consent in the early Islamic period played an inconspicuous role in so far as the basis of inter-state law in Islam was concerned Later on, the existence of widespread state practice particularly in the field of relationship of Islamic with non-Islamic entities cannot be denied, and if customary law grew up on that score, it again came to rest on the interpretation of the *Quran* and the *Sunna*, thus never losing its essentially divine basis, even though the element of consent becomes more important in the later period of Islamic history.

(ii) *The principle of Reciprocity as a basis to resolve conflicts of inter-state law*

In mediaeval India where the Generals of the Caliph or the Sultans and the Moghul Emperors of Delhi had constant dealings with the Rajput states and other indigenous political units, the principle of reciprocity and mutual interest may have constituted the sanction and the basis of inter-state law. If the element of consent entered at any stage, it could at best be an implied factor and could not be regarded as furnishing an overt basis for governing inter-state conduct. Moreover, as stated earlier, the contact of Islam with India in the middle ages represents a conflict of two legal systems; the one which believed in universality of application of inter-state laws irrespective of creed and culture and the other which believed in *pax Islamica*



Subjects of Inter-State Law in Mediaeval India of 1000 A.D.

On the eve of Muslim conquest, numerous Rajput principalities existed and engaged in inter-state relations. The names underlined in the map represent independent principalities which came into contact with the Gaznavide Empire and later with the Muslim Sultanate.

to such an extent as to regard non-Islamic states as objects unworthy of toleration, thus making co-existence impossible. It is, therefore, difficult to state what constituted the basis of inter-state law between political units governed by such different legal concepts. In such circumstances, the basis of inter-state law could primarily be mutual self-interest and, in an age which was essentially dominated by religion, the element of divine law came in to the extent to which a specific provision existed governing inter-state conduct. Here too, the different political units would pursue the dictates of their respective classical law which could be quite often at variance with one another and each side would insist on following its own principles. Thus it would be difficult to predict which law would prevail in a given case. It could have happened that in some cases the Islamic state had in some respects the better of the Aryan state whereas in some others the position was *vice versa*. Thus, for example, the immunity of the envoy or *duta* or political messenger was guaranteed by the laws of *Aryavarta* from the days of the *Ramayana* and the *Mahabharata* and had; therefore, to be respected by the Hindu state in mediaeval India Such was the case when Mohammad Ibn Qasim sent his envoy to the King of Kanauj, Rai Har Chandar, who on being insulted by the envoy replied: "It is not proper to send an envoy to prison otherwise for this speech and for this impossible claim you would deserve such treatment. Other enemies and princes may listen to you but not I. Now, go back to your Master and tell him that we must fight against each other in order that our strength and might may be tried and that either I may conquer or be conquered by you."[8] The envoy, having secured his immunity, could return safely. The safety of the envoy was such an essential rule of inter-state communication that out of sheer necessity all states had to accept it. However, in several other spheres the Islamic law prevailed. For example, there was no immunity in actual practice recognised by Islam in regard to non-believers captured as prisoners of war. If an infidel, therefore, refused to embrace Islam and

8 *Chach-Nama*, translated by Sir Henry Elliot, in Elliot and Dowson, *History of India As Told by Its own Historians*, Vol. I, 1867, at p. 208.

accept its protection, he could be slain even though he was a prisoner of war. The fall of Debul (Sind) in 711 A.D. as described by the contemporary chroniclers was followed by a carnage which lasted for three days resulting in the death of those who refused to accept Islam. It is reported that their wives and children were enslaved and all males of the age of 17 and upwards were put to the sword.[9] This practice was in consonance with the Islamic law but not justified by the principles of *Aryavarta*, which forbade the slaying of prisoners of war, let alone the inhabitants of the conquered territory, just because they professed a different religion. It, therefore, appears that the law which prevailed in this conflict was the law of the state which had the might to enforce it. However, this statement could not be accepted without an exception. We have the classic example of the return of the dead body of Biswas Rao by Ahmad Shah Abdali after the battle of Panipat of 1761 A.D., though according to the Durrani tradition the body should have been taken to the conqueror's country. The account of Kashinath, an eye-witness to the battle of Panipat, is worth reproducing:

> "The Durranis made a clamour that he (Biswas Rao) was the King of Deccan and his corpse should be dried up and taken to their country. Thereupon the body was taken to the quarters of Barkhurdar Khan and brought near the adjoining tent of Motilal, the Diwan of Khan. On hearing of this, the Nawab (Shuja-ud-daulah) mounted his horse, went to the Shah's (Ahmad Shah Abdali) presence and with the concurrence of the Vazir, requested: 'The hostile relationship extends up to the limit of life and the customs of India are that after the victory the corpse of the chief of every tribe is buried and shrouded according to their mode and usage. This idea would be the cause of good name and the contrary would be the cause of infamy. Your Majesty are not a resident of this country. We will have to deal with these persons. Therefore, the Shah

9. Elliot and Dowson, *op. cit.*, Vol. I, p. 120, *et. seq.*

should grant the favour and hand over the body of Biswas Rao Bhau Saheb so that it may be cremated according to the religion of the Hindus'. Najibud Dawlah made a similar request and other generals also concurred."

Again, in this context, it may be worthwhile mentioning that in some cases even where the law of the overpowering state which was in a position to enforce it, was more liberal than the law of the victim state, it could happen that as a matter of reprisal the state in a position to enforce its liberal law renounced it in favour of the law of the victim state in order to retaliate. This appeared to be the position arising out of the wars between the Bahmani kingdom and the Vijayanagar state in the 14th and the 15th centuries. The Islamic law permitted destruction of civilian personnel and property belonging to non-believers while the ancient laws of *Aryavarta* forbade such conduct in all circumstances, whether the war was fought within or without the fold of *Aryavarta*. However, when the kings of Vijayanagar found that their civilian population was being attacked by the forces of the Bahmani kingdom, there was no option left but to retaliate. Thus whenever the Vijayanagar kings were in a position to destroy the prisoners of war of the Bahmani armed forces, they did not hesitate to do so. This position prevailed for some time until both sides realized the futility of this practice. The well-known mediaeval chronicler Farishta, therefore, records that on being approached by the Ambassadors of Vijayanagar for the future prevention of indiscriminate massacre of Hindu women and children, Mohammad Shah took an oath that he would not, thereafter, put to death a single enemy after a victory and would bind his successors to observe the same line of conduct.[10] Farishta observes further that "from that time to his, it has been the general custom in the Deccan to spare the lives of prisoners of war and not to shed the blood of an enemy's unarmed subjects." This incident brings out the fact that at any given moment the law which prevailed was somewhat indeterminate. In the wars of the Bahmani and Vijayanagar king-

10. *Farishta*, translated by Briggs. See also R.C. Majumdar, *Delhi Sultanate*, pp. 252-253.

doms, if the classical Islamic law prevailed in the beginning, it certainly yielded place to the ancient Indian law subsequently. Thus there is quite a bit of confusion in the application of the rules of inter-state law to the political units of Islam and *Aryavarta* and it would perhaps be more accurate to state that the position was fluid throughout and, therefore, most difficult to ascertain and state with any precision. However, the basis of inter-state law which governed the relationship of Islam with *Aryavarta* may be briefly summarised as follows:—

(i) Each political unit professing its own civilization followed its own divine law and tradition as far as inter-state intercourse within its own sphere of civilization was concerned.

(ii) In the case of intercourse between the political units of Islam and *Aryavarta*, the actual rule of inter-state law which prevailed depended upon many factors, of which the most important consideration was as to who was in a position to enforce it.

(iii) If on a particular point the recognised source of law, whether *Sruti* or *Smrti* or *Quran*, was silent, the basis was furnished by the principle of expediency, which rested on mutual self-interest. In such circumstances, reciprocity and retaliation were common and often brought states on the path of law, as was the result of the wars of the Vijayanagar and Bahmani kingdoms of the South.

SOURCES OF INTER-STATE LAW IN MEDIAEVAL INDIA

Sources of Islamic Law relating to Inter-Group Relations.

If the *Quran* was the basis of inter-group law in the Islamic world of the middle ages, it was also the main source of law for the universal state of Islam of which the *Imam* was the head. Though it is essentially a book of religion, the *Quran* is not without legal norms and the latter constitute a fascinating subject of study in regard to both their origin and development. Judge Abdul Rahim, while discussing the origin of legal norms in the *Quran*, has observed: "Many of the verses laying down views of law

were revealed with reference to cases that actually arose."[11] Professor MacDonald upholds this view; he states that the legislative part of the *Quran* grew out of the "needs and questions of the townfolk of Medina."[12] Thus, a brief background of the two important sources of Islamic law, namely, the *Quran* and the *Sunna* (traditions of Muhammad), may not be irrelevant here.

It is said that if Muhammad, the founder of Islam, had not migrated from *Mecca* to *Medina* in 620 A.D., much of the legal part of the *Quran* may never have been formulated. Muhammad had developed religion in *Mecca* but he came to develop a political system in *Medina*. Thus, the religious teacher of *Mecca* became the *Imam* or the head of the *Umma* or the community of believers in *Medina*. In this latter capacity, Muhammad as *Imam* came into contact with the Hebrew and the Christian communities He also led his followers on the battlefield and thus, for the first time, got an opportunity of establishing relations of Muslims with non-Muslim tribes This may perhaps constitute the first phase of the development of Islamic law concerning inter-group relations Thus the *Quran* and *Sunna* reflected to some extent the political and the legal developments of the time.

Quran, Sunna and Ra'y as Sources of Islamic Law

In order to obtain a correct understanding of the various sources of Islamic law, including that part which concerns interstate law, it would be worthwhile mentioning the so-called *Mu'adh ibn Jabal's* tradition. The Prophet Muhammad is supposed to have sent Mu'adh to al-Yaman to take charge of the legal affairs there in his capacity as a Judge. On the eve of Mu'adh's departure, Muhammad asked him on what he would base his legal decisions. "On the *Quran*", Mu'adh replied, "But if that contains nothing for the purpose?" asked Muhammad. "Then upon your tradition", answered Mu'adh. "But if that also fails you?" asked Muhammad. "Then I will follow my own opinion", said Mu'adh, and Muhammad approved his

11. Abdul Rahim, *Jurisprudence*, 1911, p 17
12. MacDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Law*, 1931, p. 69

purpose.[18] Thus, if Jabal's tradition is relied upon, it would furnish the following three sources of law:—

(1) The text of law as obtained in the *Quran* which was the result of revelations representing the word of God;

(2) The traditions of the Prophet, often described as *Sunna*, which represent the opinions given by Muhammad to his followers in his capacity as a messenger of God;

(3) The opinions of jurisconsults or *ra'y*, to supplement divine legislation or Sunna. There is evidence to the effect that Caliph 'Umar' sent instructions to Abu Musa al-Ashari (Qadi of Basra) in which three sources of law were cited, namely, the *Quran*, the prevailing *Sunna* and reason. Although different views may have been expressed as to the authenticity of this letter, there is general agreement on the fact that reason too was introduced as a source of law to meet the requirements of the developing society. This third source may be said to correspond to justice, equity and good conscience, mentioned in the *Manusmrti* as a distinct source of law.

Custom as a Source of Law though not Sanctioned by the Quran

To the above mentioned three sources may also be added customary law, which does not find a place as such in the *Quran*. Yet, it must have been developed in the course of years on the basis of state practice alone In a society which was fast developing, the *Quran* could hardly furnish the answer to all problems and that too for all times to come. As divine legislation came to an end with Muhammad, when the Islamic state had not embarked on its ambitious programme of expansion, the later development in the social and political fabric of Islam must inevitably have given birth to new concepts of law and the deve-

18. See ibn Sa'd, *Kitab al-Tabaqat al-Kabir*, ed Sachau (Leiden, 1917), Part II, Vol II, pp 107-108, 120

lopment of customary law arising out of state practice could not be ignored.

There are two words in Islamic jurisprudence which may be said to represent customary law. First, there is *Sunna* which in the early Islamic period stood for customary law and subsequently acquired the highly specialized meaning of traditions of the Prophet. Secondly, there is the word *athar,* used in the conquered territory of Syria and Iraq which stood not only for the traditions of the Prophet, but also his successors *tabiun* and included local custom. It could certainly be argued that *Sunna* itself was not customary law since it enshrined the tradition of the Prophet alone and nothing else. In order that a custom may grow it has to be the tradition of generations and this aspect is certainly absent in *Sunna.* However, if the traditions of the successors of Muhammad were to be included in *Sunna,* even though technically unjustified, a customary law would certainly appear to evolve to meet the ever-increasing needs of the changing society. It is possible that the latter process was not absent in the Islamic world of the middle ages. Interpretation of existing law by courts and jurists, and particularly by the latter in the absence of the former, constitutes a ready source of law in a developing society. We have evidence that Malik ibn Anas who flourished in Medina in the 8th century A.D. (718-796) had the reputation of making full use of the traditions of the Prophet and his companions, with the result that a school of *hadith* or traditions had grown up there. A book *al Muwalta* had been compiled by this scholar presenting several thousand *hadiths* for the approval of theologians and jurists. This process gave rise to other sources of law also, which are briefly mentioned below.

Ijma and Qiyas

Again, as a result of the rise and expansion of Islam, two more important sources of Islamic law developed rapidly. Islam was an expanding religion and within a few decades of its existence, it spread its political hegemony in the direction of both the East and the West and conquered Syria, Iraq, Persia, Egypt, Spain and Sind. These political changes brought corresponding

changes in the concept of Islamic law which developed two important sources, namely, *Qiyas*, or analogy and *Ijma*, or consensus among the followers. The first two sources of Islamic law, namely, *Quran* and *Sunna*, constituted the basic framework and jurists resorted to the new sources, *Qiyas* and *Ijma*, only when the first two could not furnish a proper answer. The chief advocate of analogy or *Qiyas* as a source of law hailed from Iraq and flourished about the same time as Malik ibn Anas in Medina. Abu Hanifa (699-768 A.D.) had at his command convincing logic when using analogy, to develop law whenever specific *Quranic* verses or *Sunna* were lacking. The development of the two new sources, namely, *Qiyas* and *Ijma* is attributed by various scholars to different causes such as the impact of Sassanian and Roman laws. Dr. Fitzgerald, however, is not prepared to accept that Roman law had any influence on Islamic law as he attributes the new development to the Rabbinical law.[14]

Other Sources of Inter-State Law

The political units which existed under Islam entered into treaty relations with several non-Muslim states and communities with the result that treaty law, even though primarily contractual by character, constituted a source of inter-group legal rules It may be mentioned here that treaties in mediaeval India were more or less on the same pattern as treaties in ancient India in so far as they attempted to transfer territories or to settle disputes and none laid down universal international law of the type visualized by the words *Traites lois.*

Moreover, there were public utterances or instructions sent to commanders and admirals on the battle-field or *Firmans* (royal orders) in the nature of decrees which also constituted an important source of Islamic law. In addition there were books on polity known as *Siyasa* and the concept of *Qanoon* or secular law also developed to enrich Islamic jurisprudence. All these may be said to constitute evidence of inter-state or inter-group law though they could not be regarded as law within the classical meaning. If one had to ascertain the latter, the primary

14. S G. Vesey Fitzgerald, "The alleged debt of Islam to Roman law", 11 *Law Quarterly Review.*

source was the *Quran* which along with *Sunna* and both these sources, constituted, as it were, the sacred text of law. In the circumstances, they could not be equated with other less important sources of law since the latter had only evidentiary value.

SUBJECTS OF INTER-STATE LAW IN ISLAM IN THE MIDDLE AGES WITH SPECIAL REFERENCE TO INDIA

If the famous chronicle *Salsilatul Tawarikh*, written by a merchant named Sulaiman who embarked on the Persian Gulf and made voyages to India and China sometime in the middle of the 9th century A D, is to be given any credence, there were four great or principal kings in the world. According to Sulaiman, the inhabitants of India and China agreed to:—

> "place the king of the Arabs (Khalif of Baghdad) at the head of these, for it is admitted without dispute that he is the greatest of kings. First in wealth, and in the splendour of his Court; but above all, as chief of that sublime religion which nothing excels The king of China reckons himself next after the king of the Arabs. After him comes the king of the Greeks, and lastly the Balhara, Prince of the men who have their ears pierced.
>
> The *Balhara* is the most eminent of the princes of India, and the Indians acknowledge his superiority *Every prince of India is master in his own state*, but all pay homage to the supremacy of the *Balhara*. The representatives sent by the *Balhara* to other princes are received with most profound respect in order to show him honour"[15]

The narrative of Sulaiman had a parochial outlook in so far as he could only write of states which he had visited and being a follower of Islam by faith, he could not help but place the Caliph as the first prince of the world. The fact that his know-

15. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol I, p 3 See also Abbe Renaudot, *Anciennes Relations des Indes et de la Chine de deux voyageurs Mahometans qui y allerent dans le ix^e siecle de notre ere* (published in 1718)

ledge of India was confined to the kingdom of *Balhara*, identified as Ballabhipura in Kathiawar which according to Thomas was destroyed in 745 A.D.[16] would prove beyond doubt that the survey was very parochial indeed. However, if sovereign independent Empires professing a civilization of their own were alone to be considered as the proper subjects of inter-state or international law, there could not be more than half a dozen of such political entities in the eastern regions of the world. In India, for example, the absence of a *Cakravartin* may have given rise to several autonomous kingdoms some of which have been mentioned by early Arab geographers such as Jurz or Gujarat, Tafan which may have existed in the Aravali mountains or next to the salt range and Kashbin, which may have been near Kutch-Bhuj. But these political units were again those which the Arab geographers could come in contact with and there must have been several others similar in nature spread in the interior of the mainland such as Kashmir and Kanauj, which the Arab chroniclers could hardly be expected to record in any detail. It was left to Sultan Mahmud of Ghazni and to Sultan Muizzudin Muhammad Bin Sam of Ghor to contact the interior Rajput kingdoms. We have a graphic account of several political units of the 11th and 12th centuries A.D. which could be accepted as proper subjects of inter-state law, with a Raja to conduct inter-state intercourse Some of the important ones of the age were Raja Jaipal followed by Raja Anandpal of the Punjab, the Rajas of Ujjain, Gwalior, Kalinjar, Kanauj, Delhi and Ajmer. There were a host of others in the South who remained unaffected by the early Islamic invasions such as the Chalukyas, Kakatiyas, Cholas and Pandyas. They came in contact with Islamic armies in the Sultanate period when Allauddin Khilji overran South India in 1307-1311 A.D. and his General Malik Kafur touched Dwara Samudra (Cape Comorin). All these political units belonged to one and the same civilization, namely, that of *Aryavarta*, and had intercourse *inter se* as well as with the Muslim invaders who carried the banner of the Caliph at first and their successors who settled down as monarchs of the Indian

16. Thomas, *Prinsep's Useful Tables*, p 158; Tod, *Travels*, I, pp. 23 and 24.

soil later. Thus, for the purpose of the development of inter-state law in India, they should all be regarded as proper subjects since they were independent until subjugated, had complete sovereign rights internally and had also the necessary capacity to be represented without by a proper governmental machinery with the king at the apex. It is possible that conditions changed in several cases consequent upon the conquests made by the Central Asian invaders who came to spread the Islamic faith, but since the subjugated potentate often threw off the Muslim yoke, the relationship of Islam to these Indian states continued to furnish precedents of state practice which could have gradually got codified into some sort of inter-state regulation, giving birth to a proper law in due course.

A feature, however, of the contact of the Islamic state with the indigenous political units of India is the allegiance of the Muslim conquerors to the Caliph in Baghdad, which remains a special trait of the early Islamic expansion both in India and in other countries. Thus in the initial stages there can be little doubt that the Caliph and his sacerdotal empire constituted one single subject of inter-state law in relation to the multifarious units, including tribes and communities as well as Rais, Rajas and rulers, with whom Islam came in contact in the very early stage of its conquest of *Aryavarta*.

In elaborating the concept of subjects of inter-state law in mediaeval India, therefore, we have:

First, the political units of *Aryavarta* differing in the exercise of authority both within and without, such as sovereigns, suzerains and vassals;

Second, the Empire of the Caliph as one single unit which in course of time disintegrated, giving rise to autonomous political units of different descriptions.

The Political Units of Aryavarta

If the true nature of the subjects of inter-state law in mediaeval India is to be appreciated, it would perhaps be worthwhile to study the exploits of Muhammad ibn Qasim in Sind which represent the first contact of Islam with indigenous states and communities in India. By the beginning of the 8th century of

the Christian era, the successors of the Prophet were ruling an empire which extended from the Atlantic to the Indus and from the Caspian Sea to the Nile. It included Spain in the West and the regions of the Sind in the East. As we are interested in the latter, a study of the contemporary chronicles reveals that the kingdom of Sind was ruled by Dahir who came into conflict with Hajjaj, the Viceroy of the eastern province of the Caliphate. The first incident that we hear between Hajjaj and Dahir is one of state responsibility in so far as Hajjaj was claiming reparation for the orphaned daughters of the Muslim merchants sent by the King of Ceylon to Hajjaj who had been attacked and plundered by pirates off the coast of Sind.[17] It is reported that Hajjaj sent a letter to Dahir who replied that the aggressors were beyond his control and hence he could not punish them. The above episode brings out the fact that both Dahir as King of Sind and the Caliph acting through Hajjaj were two sovereign international persons in the modern sense and the claim by Hajjaj on behalf of the Caliph was legally sound. It gave rise to a series of wars as the Caliph had no means to enforce his legal right except by force.

Again, the conquest of Sind by Muhammad ibn Qasim, which perhaps followed in the wake of the above incident, reveals the existence of several autonomous units within the kingdom of Dahir. For example, Jai Singh, a son of Dahir, was the ruler of Nirun and Bajhra; the ruler of Sistan was the cousin of Dahir. Again, Aror was ruled by Fufi, another son of Dahir It is difficult to state whether these petty chieftains who were sons and relations of the King were the generals or governors of Dahir, or exercised autonomous rights acknowledging only the suzerainty of Dahir in which event they could be broadly classified under the category of chieftains. However, Muhammad ibn Qasim had to deal with each of them separately and after defeating them he established an administrator or governor who was to function under Hajjaj. In short, there existed these semi-autonomous political units in Sind which gave battle to Muhammad and in terms of prisoners of war, levy of taxes and administration of conquered territory, presented a picture which in form somewhat

17. *The Cambridge History of India,* Vol. III, 1928, p 2.

justified the designation of groups or states for purposes of inter-state law, with which we are concerned.

Thus Sulaiman's chronicle was not incorrect when it stated that "every prince in India is master of his own state" and if some of them paid homage to another, as the Balahara or to Dahir, it was either by way of acknowledgement of a Great Power or to accept the loose ties of suzerainty maintaining autonomy in material particulars. Even if a non-Islamic state agreed to owe allegiance to the Caliph and accepted the Islamic faith, it at once became some sort of a vassal state in relation to the Caliph but owing to the fact that Baghdad was a distant cry, several such vassal states maintained external relations and even fought wars with Hindu states till they were assisted by the Caliph or got destroyed owing to lack of assistance. Again, where a Hindu Rai or ruler was deposed a Muslim General was usually appointed, to replace him. When Muhammad ibn Qasim conquered Alor, he appointed Rawah to the chief-tainship of Alor.[18] This was perhaps on the analogy of what Chach had done much before the Muslim invasion when he had conquered Multan and appointed his deputy as a Thakur.[19] Here again, the Chief of Alor or the Thakur of Multan could be construed as vassals under the suzerainty of a higher authority. Such units were not much different from autonomous rulers who acknowledged submission to the suzerain. Thus, for example, prior to 712 A.D. the rulers of Brahmapur, Karur, and Ashahar were supposed to have acknowledged submission to Chach when the latter was proceeding to Kashmir to define the boundaries of his state.[20] The position of Kaka Kotal whose submission was accepted by Muhammad ibn Qasim by tying a turban round his head, was that of a Chief, recognised by the Caliph and for our purposes he could not be denied the right of being a subject of inter-state law.[21]

Apart from the conquest of Sind, the history of mediaeval India is full of indigenous political units or entities either sub-

18. *Chach-Nama;* see Elliot and Dowson, *op. cit.*, Vol. I, p. 202.
19. *Ibid.*, p. 143.
20. *Ibid.*
21. *Ibid.*, p. 162.

jugated and at peace with the main Islamic stronghold at Delhi or Agra or at war with the latter. These political units, even in their state of subjugation, let alone in a state of conflict, were subjects of inter-state law since even if they had extinguished their right to fight with the suzerain they had not in any way extinguished the right to hold relationships with the other states. The history of the Moghul Empire is full of incidents in which the Rajputana states continued to have full freedom to maintain external relations, *inter se*, that is, with other Rajput states in alliance or friendship with the Emperor and they constituted, therefore, proper subjects of inter-state law even though they may have been devoid of the right to wage war against their suzerain. In some cases, however, in breach of the pledged word to the suzerain, the vassal is known to have rebelled and hence taking into consideration the age and the then circumstances, these political units which abounded in India in the middle ages furnish a rich pattern of state practice even though it may not have been on a uniform pattern. If they were not fully sovereign in the modern sense, they were nevertheless political entities of such importance that they could give rise to intercourse among states and to the development of law to regulate the same.

The Caliph as a Subject of Inter-State Law and the Position of the Muslim States that came up under him

Again, there can be little doubt, as stated earlier, about the stability of the Caliph in the 8th century A.D., when the political organization of Islam could be described as internationally one single person with the Governors of Sind as his Generals and no more. The same could not be perhaps said of the indigenous political units which grew later, particularly with Akbar and his successors. In fact it did not take long for the Caliph himself to lose his control over his far-flung Islamic empire and the Governors gradually became hereditary monarchs. For this development, it is not necessary to wait beyond the 9th century A.D. since it is on record that Musa, son of Barmak who was left in Sind as the Deputy of Hajjaj, before his death in 863 A.D. nominated his son Amran as the successor. Sir Wolseley Haig rightly remarks that "the significance of the measure was hardly

diminished by the formality of obtaining al-Mu'tasim's recognition of the appointment. When provincial governments in the east begin to become hereditary, they are in a fair way to becoming kingdoms."[22] The authority of the Caliph is thus said to have virtually extinguished in the province of Sind roundabout 871 A.D. when two Arab Chiefs are supposed to have established independent principalities at Multan and Mansurah. Similarly, it can be said of Sultan Mahmud of Ghazni that though he accepted in religious theory and perhaps in legal fiction the existence of the Caliph, he was, for all practical purposes, a full-fledged sovereign authority wherever he went and conquered. The religious obedience to the Caliph came to take the shape of the *khutba*, read in the name of the Caliph and the legal fiction rested on the coin which was struck in the name of the Government of the Caliph. In addition, it is also on record that Mahmud of Ghazni never, on his own, used the epithet of Sultan because the Caliph had bestowed on him the designation of Amir only. However, there can be little doubt that Mahmud was attracted by the title of Sultan because in 1002 A.D. when he crushed a rebellion in Sistan, it is on record that he was pleased with the leader of the revolt who addressed the conqueror by the then unfamiliar title of Sultan.[23] Mahmud, elated by this epithet, is supposed to have pardoned the rebel leader and rewarded him with the governorship of another district. Thus the ties between the Pontiff at Baghdad and the Muslim governors who came to stay in Sind and the invaders from Central Asia who overran the heart of *Aryavarta* in the name of Islam (with the Supreme Pontiff at Baghdad) were more theoretical and fictional than real or practical. If "Sultan" conveyed sovereignty and the same was denied to Mahmud of Ghazni in 1002 A.D., it is on record that in 1229 A.D. the Slave King of Delhi, Iltutmish, was invested by the Caliph with a robe of honour and granted recognition of the title of "Sultan of India". It is true that Iltutmish had sought it and perhaps begged for it which may be so because he was a slave by birth and was keen to obtain religio-legal sanction for his position. However.

22. *The Cambridge History of India*, Vol. III, p. 9.
23. *Ibid.*

his powers after 1229 A.D., when the envoy of the Caliph invested him with the insignia of Sultan, were as supreme as prior to 1229 A.D.

The above historical narrative would go a long way to establish that the Muslim states that sprung up in India were proper subjects of inter-state law as were the autonomous indigenous Hindu states which came into conflict with them. Thus, in one sense, mediaeval India may be said to present a wealth of inter-state practice of a nature which may be without many parallels since the states establishing intercourse not only belonged to different religions but also professed different legal systems and were truly international in character. Islamic theory did not tolerate the existence of a non-Muslim state and the latter could exist only in derogation of the ideal which was that of universal Islamic state. Nevertheless in the conduct of inter-state relations such as preparatory to the declaration of a war, some sort of an equality of status, between Islamic and nor Islamic states clearly existed as is revealed by the exchange of ambassadors for prior negotiations. It is recorded by *Chach-Nama* that Muhammad ibn Qasim sent a Muslim envoy, a Maulana Islami of Debal, to the court of Dahir, which represents some sort of equality of status in practice howsoever repugnant it may be to Islamic theory. What happened in the 8th century A.D. held good even in the 18th century as Ahmad Shah Abdali and his allies sent envoys to negotiate terms with the Mahrattas prior to the battle of Panipat.

In State practice Islam accepts toleration of non-Islamic Units and subsequently permits co-existence

As some sort of equality in status of the political units is a *sine qua non* for the proper growth of inter-state law and since theory of *pax Islamica* based on the concept of *Dar-al-Islam* would not recognise political units outside its sphere, there is need to explain briefly the slow evolutionary process by which first the states represented by the "People of the Book" and subsequently the states of the "Idolators" came to be recognised by Islam, as a matter of state practice even though not strictly in pure theory. However, this process was indeed slow and came

about in various stages. According to Sir William Muir, the conquest of Sind marks the first stage in the Muhammadan policy. It is well known that Islamic law divides misbelievers into two broad categories, namely, 'the people of the Book' professing the Christian or the Jewish faith who are supposed to be "possessors of inspired scriptures" and, secondly, the idolators whose religion was "in the eyes of Islam based without proper authority of scriptures" Islam had separate sets of principles to govern the intercourse of states belonging to these two broad categories inasmuch as, if Christian and Jewish lands were conquered the lives of the inhabitants were not to be molested in any way, even in the practice of the rites of their creeds, so long as they paid *jizya* or polltax and accepted the rule of Islam. However, in the case of idolators, the *Quran* was interpreted to present to this class the choice between Islam and death[24] It is pointed out by Sir Wolseley Haig[25] that "by a legal fiction which placed the scriptures of Zoroaster on a level with the Old and New Testaments as a divine revelation the Magians of Persia had often obtained the amnesty which was strictly the peculiar privilege of Christians and Jews, but Hajjaj, a bitter persecutor, knew nothing of the lax interpretation which tolerated idolatry on payment of tribute, and in Central Asia idolators were rooted out." A theory so rigid was bound to come, in actual practice, into conflict with other mighty empires and civilizations of the world, and could not last long without proper modification. Islam had to face in the West a powerful Christian legal order and in the East the ancient legal system of *Aryavarta*. The Christian and the Muslim states after a long period of warfare came to the conclusion that the moral and political principles of one could not be imposed on the other, and hence both Islamdom and Christendom had to accept the inevitable which was the existence of both in a world which was wide enough to accept more than both. It may be observed here that in regard to co-existence Christendom was akin to Islamdom inasmuch as it did not believe in the universality of

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24 Sir Wolseley Haig brings out this aspect in the *Cambridge History of India*, Vol. III, p. 4.

25. *Ibid*

application of its inter-state laws which were designed to apply within Christendom alone.

The process of co-existence of Islamic states with Christian states and subsequently of Muslim states in mediaeval India with the indigenous political units of *Aryavarta* was hastened by the schisms which tore the Islamic legal structure as well as its theology. This may be said to introduce the second stage in the process of evolution by which Islam in practice accepted states of other creeds. Doctrinal schism in Islamic history is known to have resulted in the rise of a rival religious political party which ultimately divided Islamdom into two different zones. The most lasting split in the body politic of Islam took place in the 16th century after the extinction of the Arab Caliphate. The two non-Arab dynasties, namely, the Ottoman and the Persian, after a long period of warfare, agreed to sink their doctrinal differences and to accept that religion alone could not regulate their inter-state conduct. Once a secular basis was introduced in the external relations of these two Empires of Islam, the principle of co-existence was inevitably born. It was indeed an important landmark in the history of Islam when religion came to be separated from the conduct of the state at least in respect of external relations and this fundamental principle obtained full recognition in 1535 A.D., when a Treaty was signed by Sulayman, the Magnificent, of the Ottoman Empire with King Francis I of France. The very first article of this Treaty stipulated that a "valid and sure peace would be established between the two states and reciprocal rights conceded to the subjects of the nation in the territory of the other." This acceptance of the principle of peaceful relations between Islam and Christendom has been often described as a revolutionary departure from the classical principle of permanent war or *jehad*. Thus, *Dar-al-harb* which was the field of *jehad* (non-Islamic territories) came to be duly recognised by Islam in practice. This treaty marks the beginning of the practice of recognition of nations of different faiths and this attitude of Islam gradually came to be applied to mediaeval India also.

The process of evolution by which Christendom rose to the status of equality of practice with Islamdom was typical of the

process which took place in the relationship of Islam with the states of *Aryavarta* in mediaeval India. Even during the conquest of Sind in the 8th century A.D., Muhammad ibn Qasim was not able to apply the strict principle of the sword advocated by Islam against idolators. It is on record that Muhammad granted amnesty to idolators and in many cases left their temples standing and permitted them to worship. At Debul he behaved as an orthodox Muslim but his subsequent policy was toleration except when he met with obstinate resistance or his troops suffered serious losses. "Thus we find the jealous Hajjaj remonstrating with the young soldier for doing the Lord's work negligently and Muhammad consulting his cousin on the degree of toleration permissible."[26] Though subsequent invaders of Islam may have been ruthless in the suppression of idolatry, it was a question of a few centuries before recognition was granted to the indigenous political units by Emperor Akbar in whose reign the position of idolators is said to have been as good as that of the followers of Islam.

As the latter period of mediaeval India became the meeting ground with a third civilization, namely, Christendom, it may be mentioned that the Moghul Emperors recognised the English trading community when it gained a settlement on the soil of India in the 16th century A.D. The Great Moghul was prepared to enter, if not in treaty relations with a non-Islamic power, at least into commercial relations when by a *firman* or an Imperial Decree he conferred trading privileges on the English business community. This was in response to the letter which Queen Elizabeth had written "to the most invincible and most mighty prince, Lord Zelabdin Echebar (Akbar) King of Cambaya" (Gujarat), requesting the Emperor to receive her subjects favourably and to grant their request. There is also another example of a similar letter written by Queen Elizabeth to the King of Achem which also resulted in some sort of a commercial treaty. The contemporary jurists of the Elizabethan Age like Gentili[27] wrote in favour of such commercial relationship between Christian nations and non-

26. *The Cambridge History of India*, Vol. III, p. 4.
27. *The Classics of International Law* (1933), *De Jure Belli Libri Tres*, Vol. II p. 31 A.

Christian powers. Vattel too accepts the proposition that such commercial relations could be entered into on a permanent footing.[28] However, Ward has been critical of the treaties entered into by Christian powers with states outside Christendom inasmuch as he has remarked that such treaties "had the effect of amending the law of the nations."[29] This indicates how the physical existence of states professing different religions but gradually coming into contact with each other brushed aside religious theories which were meant to keep them apart for ever. The law arising out of practice was far more dynamic and hence overruled the law based on theory, howsoever divine its origin may have been.

CONCLUSION

The historical account given above of the various types and categories of subjects of inter-state law of mediaeval India could be summarised by mentioning the following broad classification of international personalities:

(1) If sovereign imperial units professing a civilization of their own were to be considered as subjects of inter-state law of the middle ages, Islam and the kingdoms of *Aryavarta* would certainly rank as such. It would be difficult to add many to Sulaiman's list of four, namely, the Chinese Empire, the states of *Aryavarta,* the Empire of the Caliph and the Greeks. The latter had declined by the 8th century A.D. as had the Roman Empire and in their place had come the Byzantine Empire and the Empire of Charles the Great. The latter had been crowned in 800 A.D. in Rome and of him, therefore, is said "*Renovatio Imperii Romanorum*". However, we are not dealing with the subjects of international law of the mediaeval world as a whole since our perspective is confined to mediaeval India and Islam. In that context the position stood much narrowed down as brought out below.

(2) In the 8th and perhaps the 9th century A.D., the Caliph and his Empire constituted perhaps a single international per-

28. *The Classics of International Law* (1936) *Le Droit des Gens*, Vol. III, p. 122

29. Robert Ward, *Foundation and History of the Law of Nations*, p. 332.

sonality and the conquerors were made generals and representatives of the Supreme Pontiff at Baghdad.

(3) With the weakening and, later, disintegration of the Caliphate, the area conquered and the states planted by Islam on the Indian soil became *de jure* sovereigns in every sense and constituted proper subjects of inter-state law in so far as such subjects existed in the middle ages

(4) The Islamic states of mediaeval India established during the Sultanate period (1200 to 1500 A.D.) or during the Moghul regime (1526-1707 A.D.), particularly the latter, followed the pattern of the mighty kingdoms of *Aryavarta* and on the principle of *Cakravartin* either had territories directly administered after subjugation or had political units paying homage or tribute and thus existing in subordinate relationship to the suzerain. The pattern of the latter varied from area to area and in some cases the ties of suzerainty typical of the *Cakravartin* ideal were accepted and worked within the Islamic political organization. Thus, apart from subjugated territories, the Hindu states which accepted vassalage continued to be political units of importance and could not be deprived of their inter-state personality. This would certainly apply to the states of Amber, Jaipur, Jodhpur, *etc.*, during the Moghul days as also to Raja Deogar in the time of Ala-ud-din Khilji. Such states even though not fully sovereign had a quasi-inter-state personality and from our view-point could not be excluded.

(5) On the side of *Aryavarta*, the various types of political units which existed in the middle ages could be broadly divided into the following categories:

(a) The kingdoms equal in status and in no way subordinate to one another.

(b) Vassals of (a) above which had inter-state personality of some sort inasmuch as they could maintain intercourse with other states.

(c) Petty Chieftains and Thakurs with no powers to exercise external relations. These were not subjects of inter-state law at any time.

The modern principles of sovereignty and equality furnishing the basis of modern inter-state recognition were not applicable in the middle ages. The true test had to be restricted to the capacity to conduct inter-state intercourse. Such a test could not be regarded as contrary to the fundamental principles of international law as known today since India before 1947 (neither independent nor sovereign) exercised powers of international intercourse inasmuch as she was a Member of the League of Nations, the Universal Postal Union and other international organizations, maintaining also representations in London and the United States. If she was not a proper international person, she at least had a quasi-international personality. On that analogy, the middle ages had a vast flourishing comity of states, if not a family of nations, and intercourse amongst themselves, both warlike and peaceful, was of such an order as to promote the regulation of inter-state conduct. The laws which sought to govern this intercourse for well over 500 years constitute a study on their own.

CHAPTER VI

LAW OF PEACE

ITS IMPORTANCE AND FIELD OF OPERATION

Though the doctrine of *jehad* remained the corner-stone of inter-state relations in Islamic theory and practice, and laws of war, therefore, constituted the most important chapter of international law of the age, the laws of peace, howsoever meagre, could not be relegated to an inconsequential position in the concept of Islamic Jurisprudence. If the task of universalizing Islam was impossible and hence the world had to be divided into *Dar-al-Islam* and *Dar-al-harb* (which stand respectively for the world of Islam and the enemy territory), and the area represented by the latter was either subjected to constant warfare or was considered non-existent, being unworthy of recognition, there was still a large field in which peace operated. This sphere, if properly analysed, would, according to Islam, comprise the following:—

(1) The entire region of Islamdom consisting of several independent states was, in strict theory at least, at peace *inter se* since internecine warfare was prohibited. Whatever may be the practice, the text of the divine law runs thus:

"Never should a Believer kill a Believer"

(*Quran, Sura* IV, 92)

and

a still more significant verse:

"The Believers, men and women, are protectors of one another."

(*Quran, Sura* IX, 71)

As the Dominions of the Supreme Pontiff of Islam were one of the mightiest ever carved in the history of the world, inter-state relationship under the Caliph flourished within Islamdom where, in theory at least, peace was to be the order of the day.

(2) Again, that region of the world which had an understanding with Islam was also at peace because it had either acknowledged the loose ties of suzerainty of Baghdad while retaining its own religion or accepted the Islamic faith.

Though the category enumerated at (1) above has not been specifically mentioned by writers on the subject, there could be no doubt that it constituted an important factor in the area of operation of peace. As far as the second category is concerned, we have the evidence of jurists, particularly of the shafiis, who did acknowledge the existence of the third division of the world which they named as *Dar-al-sulh*, or world of peace, or *Dar-al-ahd* (world of Covenant). The area covered by this category comprised non-Muslim states which entered into treaty relations with Islam whether before hostilities or after the conclusion of a war. The state of Islam or *Dar-al-Islam* gave some sort of qualified recognition to these non-Muslim states if they paid tribute, poll tax or *jizya* and acknowledged the overall superiority or suzerainty of the Caliph or the Muslim Emperor, as the case may be. It could thus be argued that *Dar-al-sulh* was more important than *Dar-al-harb* from the political viewpoint as the former held a position of recognition, though having a status inferior to that of *Dar-al-Islam*. Moreover, *Dar-al-sulh* represented a geographical area comprising political units, which were proper subjects of inter-state law, at peace with Islam. Thus the realm of the law of peace in the Islamic concept was in no way inferior to the area subjected to *jehad*.

However, Majid Khadduri comes to the conclusion that the law of peace was in theory "only a temporary device to regulate the relations of Muslims with the outside world during non-hostile period (*i.e.*, when the *jehad* was in suspense)."[1] It is

1. Majid Khadduri, *War and Peace in the Law of Islam*, 1955, p. 145.

difficult to accept this view because, in theory at least, the concept of *Dar-al-Islam* was highly suggestive of the spread of Islam throughout the four corners of the world; and under the umbrella of Islam, there was to be peace and not warfare. On the above interpretation of Islamic theory, the law of peace was a permanent objective to be attained or striven for through the instrumentality of *jehad*, the latter being a temporary expedient to last only so long as the world was not completely Islamised. Thus the prevalence of the law of peace would appear to be the ultimate objective in a world dominated by Islam It could also be argued that since the region of *Dar-al-Islam*, in actual practice, was not devoid of political units, the latter were proper subjects of inter-state law. This would lead to the conclusion that the law of peace in the middle ages could be ignored neither in Islamic theory nor in the practice of Muslim states. It would be incorrect to give it a position of lesser priority or importance in a discussion of inter-state law of the time.

RECOGNITION OF STATES

If a law concerning recognition of states could be traced to the middle ages, it would appear to be based mostly on state practice. Again, in a majority of cases, recognition could only be implied either directly or often indirectly from the conduct of states, whether belonging to the Islamic fold or to *Aryavarta*. This would appear to be the correct position because in classical Islamic law, there was little or no scope for the operation of any rules governing recognition of states. The whole of *Dar-al-harb*, as stated earlier, had no recognition in the eyes of Islam and the entire Empire of the Caliph constituted, in strict theory, a single international person not recognising any other person. However, in actual state practice, the position departed almost radically from the theory inasmuch as recognition was given by the Caliph himself to Muslim princes in Central Asia, which amounted to recognition of sovereignty. Again, wars were fought and treaties were signed by rulers of Islamic states with political units of *Dar-al-harb*, which gave recognition to states outside Islamdom. In short, therefore, the entire law of recognition in the middle ages came to rest on state practice. It could

be argued that recognition was so well established in practice that the negation of recognition in strict Islamic theory must have ultimately yielded place to the legal acceptance of the doctrine of recognition in actual practice A brief mention is, therefore, made below of the various types and kinds of recognition which came to be developed by state practice

KINDS OF RECOGNITION

As inter-state law in mediaeval India revolved round states professing different faiths and owing allegiance to separate legal systems, the types and kinds of recognition granted to states directly or by way of inference or by implication could be broadly categorised as follows:—

(1) Recognition granted by the Caliph to Rulers of Islamic states within the domain of *Dar-al-Islam*

(2) Recognition of the Caliph himself by the Islamic Rulers and the theory of "Plural Imams"

(3) Recognition by Islam of non-Muslim political units consequent on waging a war, accepting a truce or signing a treaty These were of two types:—

  (a) Recognition by the Caliph of political units of *Aryavarta.*

  (b) Recognition by the Islamic states established in India of indigenous political units of *Aryavarta.*

(4) Recognition accorded by states in *Aryavarta* amongst themselves or to Islamic states outside

It would help a study of the principles relating to recognition if case-law giving the practice of states could be cited illustrating the above modes or categories of recognition

(1) *Recognition by the Caliph of Rulers of Islamic States within the domain of Dar-al-Islam*

In this category of recognition, there are precedents of different types such as:—

(a) Recognition granted by the Caliph to Central Asian Rulers of Islamic states.

(b) Recognition by the Caliph of the Sultans of Delhi.

(c) Recognition by the Caliph of the Islamic Rulers of South India.

(a) The Caliph's Recognition of Central Asian Rulers

In 999 A.D., Sultan Mahmud, who had accepted the Caliph al-Qadir Bi-llah, defeated the latter's rival Abdu'l Malik, the Samanid, and ordered the *khutba* to be read in the name of the former, as a result of which the Caliph "granted to him the patent of the sovereignty of Khurasan and bestowed on him the honorific title of *Yaminu'd-Dawlah wa Aminu'l Millah.*"[2] After the Sultan's recognition as an independent sovereign by the Caliph of Baghdad, reports Utbi, Mahmud made it obligatory on himself to undertake every year an expedition to Hind.[3] Again, Sultan Mahmud showed his loyalty to the Caliph of Baghdad inasmuch as he sent to the latter, in original, the communication which he had received from the Caliph of Cairo in 1012 A.D., asking him to give his allegiance to Cairo instead of to Baghdad. It is recorded by Ibn Jawzi that the letter of the Caliph of Cairo which Sultan Mahmud had sent to Baghdad was burnt in public. As a result of the devotion of the Sultan to duty, the Caliph at Baghdad further honoured the Sultan by bestowing on him the title of *Nizamu'd-Din.* The recognition granted by the Caliph of Baghdad to the Sultan was certainly not of vassalage to the supreme pontiff but one of recognition of sovereignty. It is reported that the Sultan became much less obsequious towards the Caliph in subsequent years, as he amassed vast fortunes and extended his territories. Though the Caliph may have continued to bestow further titles on the Sultan, such as the one which followed his campaign in Somnath in 1026 A.D., when the title of *Kahfu'd-Dawlah wa'l-Islam* was

2. al-'Utbi, *Tarikh-i-Yamini,* 1885, p 133. See also Muhammad Nazim. *The Life and Times of Sultan Mahmud of Ghaznia,* 1931, p. 164.

3 al-'Utbi, *Tarikh-i-Yamini,* p. 134.

conferred, it would not be inaccurate to state that the Sultan paid much less heed and attention to such titles in subsequent years and treated himself as fully sovereign, owing allegiance to none except perhaps in religious matters the Caliph.

(b) The Caliph's Recognition of the Sultans of Delhi

The Caliph also gave official recognition to various Sultans of Delhi and in this connection sent robes of honour with a patent which conveyed *de jure* recognition of the sovereignty of the Sultan. As stated earlier, Iltutmish was so recognised by the Caliph on February 8, 1229 A D Again, Muhammad Tughluq who ascended the throne of Delhi in 1325 A.D. received with royal honours at his court Ghiyasuddin, the great-great-grandson of the Abbasid Caliph al-Mustansir of Baghhdad. The Sultan is reported to have behaved with great servility inasmuch as he requested Ghiyasuddin to place his foot upon the Sultan's neck after showing "extravagant veneration for the temporal as well as the spiritual authority of the Caliphate.. "[4] There could be little doubt in the mind of Muhammad Tughluq that no sovereign could be the ultimate authority unless he was commissioned by God's Viceregent on earth, who was the Caliph, known as the "Commander of the Faithful."[5] The Sultan, it is reported, went to the extent of holding Ghiyasuddin's stirrup while he mounted on his horse and they both rode together with the royal umbrella held over their heads. The use of the royal umbrella, a symbol of sovereignty, by both the Sultan and the Caliph, is significant inasmuch as the political status of the Sultan was in no way inferior to that of the Caliph.

Such was the belief of Muhammad Tughluq that he had sought by means of a humble petition, accompanied by costly gifts, the Caliph's recognition, without which he felt he could not perform the great festivals of Islam In 1394 A.D. Muhammad Tughluq received Haji Sa'id Sarsari, the envoy sent by the Abbasid Caliph al-Hakim II of Egypt. The envoy of the Caliph came in response to the prayers of the Sultan for ponti-

4. *Cambridge History of India*, 1928, Vol III, pp 137-138
5 *Ibid*, p 158

fical recognition, which included acceptance of the Sultan's sovereignty over Hindustan. The envoy bore the Caliph's decree of recognition and a robe of honour. Muhammad placed the latter on his head and ordered the recital of the Friday prayers with great pomp, and, "the names of such previous rulers of India as had failed to obtain the formal recognition of one of the Abbasid Caliphs, were omitted from the formal sermon."[6]

The recognition which Sultan Firuz Shah Tughluq, the successor of Muhammad Tughluq, obtained in 1355 A.D, was in similar terms and the *Tarikh-i-Mubarak Shahi* has described it in the following words[7]:—

> "In the month of *Zi-l hijja*, on the day of the *Id-i azha*, in the year before named, a robe of honour and a diploma arrived from the Khalifa al Hakim bi amr-illah Abu al Fath Abu Bakr Abu al Rabi' Sulaiman, the Khalifa of Egypt, confirming on (the Sultan) the territories of Hindustan... "

The incidents narrated above from the Sultanate period of mediaeval Indian history indicate that the Sultans were fully aware of their sovereign status and sought religious sanction for the same by obtaining recognition from the Caliph. As stated earlier, the use of the royal umbrella by both the Caliph's representative and the Sultan, coupled with the fact that the Caliph conferred the territories of Hindustan on the Sultan, proves the sovereign status of the latter, even though the Sultan would always have to give his religious allegiance to the Caliph.

(c) The Caliph's Recognition of Other Islamic States in Mediaeval India

Malwa

It is well-known that the Caliph not only recognised the Sultans of Delhi but also extended his recognition to independent kingdoms such as those which existed in Malwa and the Deccan. Malwa had become independent of Delhi after the invasion of

6 *Cambridge History of India*, 1928, Vol. III, p. 164

7 Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol IV, p. 9

Sultan Timur in 1398 A.D. Mahmud proclaimed himself as the king of Malwa on May 13, 1436 A.D. and it was after some 30 years of his reign that he obtained recognition from the Caliph. It is reported that, in 1465 A.D., Mahmud received at Mandu an envoy from the puppet Abbasid Caliph of Egypt, who brought for him a robe of honour and a patent of sovereignty. By this time, the Caliph had declined in power and the honour which conferred the "patent of sovereignty" was issued mainly for the purpose of filling the coffers of the needy Imams who still remained in theory the "Commanders of the Faithful."[8] In practice, they had merely become courtiers of the Mamluk Sultans of Egypt. Nevertheless, history records that the lesser Sultans in India regarded the distant Caliphate of Egypt as the spiritual head of Islamdom and the message of recognition tickled their vanity even if it did not confer any tangible benefits

The Deccan or the South

Again, in the Deccan, *'Ala-ud-din* Bahman Shah established a kingdom which for over 340 years could not be wholly recovered by Delhi After extending his territories by conquering neighbouring regions, Bahman died on February 11, 1398 A.D., leaving four sons of whom Muhammad was the eldest. It is recorded that immediately after the accession of Muhammad I, his mother performed a pilgrimage to Mecca where she communicated with the Caliph in Egypt, from whom, on her return in 1361 A.D., she brought a patent recognising her son as the King of the Deccan. This recognition by al-Mu'tadid, the puppet Caliph, gave *de jure* authority to Muhammad to assume on the coins the title "Protector of the People of the Prophet of the Merciful God."[9] It is also recorded that Muhammad's father had sought and obtained this coveted recognition in 1356 A.D when the Caliph's envoy to Firuz Tughluq of Delhi had desired him to recognise and respect the Muslim Kings of the Deccan. This is another example of recognition being granted by the Caliph not to the central authority of the Sultans of Delhi, but to an independent kingdom carved out by Muslim rulers in those

8. *Cambridge History of India,* Vol III, 1928, p. 358.
9. *Ibid*, p 376.

regions of India where the writ of the Delhi Sultanate did not run.

A study of the nature and function of the recognition granted by the Caliph to Muslim princes in India would indicate that the Imam did not hesitate to recognise unequivocally the sovereignty of either the Sultans of Delhi or the independent kings of Malwa and the Deccan. In fact, he did not distinguish between the recognition which he gave to the more powerful Sultans of Delhi and that which he gave to the lesser Islamic rulers of autonomous kingdoms in India. If there was a distinction, it was of a minor nature, being in the wording of the title For example, when recognising the kings of Delhi, the title of "Sultan of Hindustan" was conferred, whereas recognition granted to the autonomous kingdoms outside the Delhi Sultanate limited the title to the "King of the Deccan" or the "King of Malwa", as the case may be. Nevertheless, the lesser potentates also got high titles like the "Protector of the People of the Prophet of the Merciful God." So far as the conferring of sovereign status was concerned, there was little to choose between recognition given by the Caliph to a Sultan of Delhi or an independent king of Malwa or the Deccan

(2) *Recognition of the Caliph by the Islamic Rulers and the theory of Plural Imams*

In classical theory, since there could be only one God and thus one legal system, there could be only one ruler and hence the pluralistic doctrine of the Imamate could be heretical. However, Muslim jurists like Ibn-Rushd and Ibn Khaldun suggested that if the territories of *Dar-ul-Islam* had become so extensive as not to be controlled by one Imam, there could be no objection to two or more Imams, provided each one was devoted to enforcing the law in his own dominion This was not possible as neither legal theory nor political practice could define the relationship between two Imams, with the result that Islamic rulers had to choose between one or the other Imam. In short, the practice grew of rulers in Central Asia accepting one Imam and thus not only refusing to recognise the other Imam, but holding the latter's existence as completely unlawful. Thus Sul-

tan Mahmud of Ghazni took up arms in support of the Caliph of Baghdad to fight the Caliph of Cairo. The persecution of the Carmathians and the hostility of Sultan Mahmud of Ghazni towards them are a feature of Central Asian history. Therefore, both in theory and practice, if the Caliph recognised the Islamic rulers of the age, the latter also, by accepting one or the other Caliph, may be said to have recognised the existence of the Caliphate itself. The Caliphate was an international institution, owing its superior status to the fact that it gave recognition to rulers, which the latter held in high esteem and sought at great expense. No account of the law of recognition in mediaeval India would thus be complete without taking into consideration the recognition of the Caliph himself and the recognition he gave in turn to distant rulers within Islamdom.

(3) *Recognition given by Islam to non-Islamic Political Units*

(a) *Recognition by the Caliph of political units of Aryavarta.* The classical Islamic legal theory permitted the Islamic states to have treaty relations with non-Muslim powers since Muhammad himself had negotiated such a treaty with the Makkans.[10] Thus non-Islamic states could be recognised, provided they fulfilled certain conditions. In the early stages of the history of Islamic expansion, Christian and Jewish states may have been treated differently from the states of *Aryavarta* on the ground that the latter consisted of idol worshippers whereas the former possessed scriptures. In course of time, the Islamic rulers of Delhi had no hesitation in treating non-Islamic states as autonomous units for all internal purposes, provided they paid certain taxes enjoined by the Islamic law.

The earliest illustration we have of the recognition of a Hindu ruler by the Caliph dates back to the conquest of Sind by Muhammad ibn Kasim in the 8th century A.D. when Kaka Kotal made his submission to the conquering general of Islam. There is a graphic account recorded in *Chach Nama* which merits reproduction. After Kaka Kotal had stated, "I make my submission to you and I will be your counsellor, and assist you to the extent of my power. I will be your guide in overpower-

10. Khadduri, *op. cit.*, p. 208.

ing and subduing your enemies", Muhammad ibn Qasim praised "the great God and in giving thanks placed his head upon the earth. He comforted Kaka and his dependents and followers, and promised him protection. He then asked him, 'O chief of Hind, what is your mode of bestowing honour?' Kaka said, 'Granting a seat, and investing with a garment of silk, and tying a turban round the head. It is the custom of our ancestors, and of the Jat Samanis.' When Kaka had invested him with the dress, all the Chiefs and headmen of the surrounding places wished to submit to him Kaka plundered a people who were wealthy, and took much booty in cash, cloth, cattle, slaves and grain Muhammad Kasim, having marched from that place, came to the Fort of Sisam. There he fought for two days and God granted him victory ..Those Chiefs were enemies of Dahir, and some of them had been slain—hence they had revolted from him, and sent ambassadors and agreed to pay a tribute of one thousand dirams weight of silver, and also sent hostages to Siwistan.

"When Muhammad Kasim had fixed the several tributes of those Chiefs, he gave them fresh written agreements for their satisfaction."[11]

The above account brings out the fact that the representative of the Caliph in Sind and Kaka Kotal, the local chief, recognised each other by means of a process of investiture, as described above. Moreover, the other lesser princes and chieftains were also recognised since they agreed to pay tributes to the conqueror and the *Chach Nama* records that written agreements were signed with them for their satisfaction.

(b) *Recognition by the Islamic States in India of indigenous political units of Aryavarta.* Again, the Rajput states close to the imperial power at Delhi were recognised by the Moghul Emperors but not by the Caliphs. Akbar and his successors had different methods of recognising Rajput states and though the latter, with the exception of Mewar, may have paid tributes or attended the Moghul Court, there is little doubt tha

11 *Chach Nama*, see Elliot and Dowson *The History of India as told by its own Historians*, Vol. I, 1867, p 162

their internal sovereignty was well-recognised by the Padshahs of Delhi. Mirza Raja Man Singh of Amber was a friend and an ally as well as a distinguished General and one of the Governors of the provinces of the Moghul Empire, all rolled into one. The recognition of the Amber Raj came in the form of *Khilats*, titles and even appointments in the Mansabdari system. As far as titles were concerned, the Moghuls were known to confer distinction which went with sovereignty such as the *Mahi Muratib*, or the Order of the Fish. Similarly, in granting ranks in the Mansabdari system, Raja Man Singh got the highest office which could be given with distinction to a Moghul prince himself. Nevertheless, there could be little doubt about the subordinate position of these non-Islamic princely states which found recognition within the Moghul Empire. Akbar himself came near to attaining the concept of *Cakravartin* and entertained liberal ideas as to how he should treat autonomous political units within his empire, permitting a status slightly higher than that of vassal but without the right to maintain external relations.

(c) Apart from political units which were in some sort of subordinate cooperative alliance with the Moghul Emperors or with the Muslim kingdoms outside the Empire of Delhi, there were several small and petty as well as some large political units which had complete autonomy and sovereignty, in the sense that they neither acknowledged the supremacy of Delhi nor paid tribute to any other Islamic kingdom in India. Such political units were quite often attacked and temporarily subjugated but continued to defy authority and thus retained their independence. For a long time to come, the Kingdom of the Ranas of Chittor or Mewar kept itself aloof and defied the imperial Muslim authority of Delhi. Similarly, while independent Muslim kingdoms of Malwa and the Deccan had come into existence, there were several small political units breathing freely because the local Sultans had no time or lacked in resources to subdue such states. Thus, Sultan Mahmud of Malwa marched to Mandalgarh in 1457 A.D. and took the place by assault, but he did not, according to Sir Wolseley Haig,[12] proceed to defeat the Raja of Kumb-

12. *Cambridge History of India*, Vol. III, p. 357.

halgarh whose fortress was too strong to be taken without a tedious siege. He was thus content with obtaining indemnities and left the Raja of Kumbhalgarh and the Raja of Dungarpur undisturbed in their possessions. Such states thus existed and were tacitly recognised by the Islamic kingdoms in India, whether at Delhi or elsewhere. The existence of such political units and their indirect recognition by Islamic kingdoms, arising out of state conduct, is a noteworthy feature of inter-state law and relations of mediaeval India.

(4) *Recognition given by States in Aryavarta amongst themselves or to Islamic States outside*

The frequent occasions when recognition had to be granted by states of Aryavarta amongst themselves came up each time an alliance or confederacy was organised to fight the Islamic invaders from Central Asia. In 1008 A.D., when Raja Anandpal organised a grand alliance of Rajput rulers, of which mention has already been made, recognition *inter se* was automatically given to the members of the confederacy, who were the Rajas of Ujjain, Gwalior, Kalinjar, Kanauj, Delhi and Ajmer. Similarly, in 1526 A.D., Ibrahim Lodi had organised an alliance of local rulers when he fought and lost the battle of Panipat against Babur. Raja Vikramajit, the old ruler of Gwalior who was duly recognised by Ibrahim, was a member of the alliance. Again, in the following year, 1527 A.D., Rana Sanga of Chittor organised a confederacy of Rajput rulers and local potentates professing even the Islamic faith to fight Babur at the famous battle of Kanua. It is reported that "Silahdi (Silah-ud-din), the Chief of Bhilsa, joined the confederacy with 30 thousand horse, Hasan Khan of Mewat with 12 thousand, Medini Rao of Chanderi with 12 thousand and Rawal Udai Singh of Dungarpur with 10 thousand, and Mahmud Lodi, a son of Sultan Sikander Lodi, who had been acknowledged as king of Delhi by the Rana also came to take part in the battle at the head of 10 thousand mercenaries."[13] In a war-like alliance of the aforesaid type,

13. *Memoirs of Babur* (translated by L. King), 1921; See also Ishwari Prasad, *A Short History of Muslim Rule in India*, First Ed., p. 306.

de *jure* recognition must be presumed to be given to the Rais, Rajas and Rawals as well as the Sultans and Khans of Islamic faith who came to fight side by side for a common cause. The states recognised as autonomous political units which fought Babur at Panipat in 1526 A.D. or at Kanua in 1527 A.D. did not belong to one faith. Ibrahim Lodi had the Raja of Gwalior at Panipat as much as Rana Sanga had Hasan Khan Mewati and Sultan Mahmud Lodi as allies sovereign in their own right.

Another method by which recognition was granted in mediaeval India was by exchange of envoys entrusted with an *ad hoc* mission. Thus Babur mentions[14] in his memoirs that Rana Sanga had sent an ambassador to him in Kabul whom Babur received with due ceremony, implying thereby mutual recognition by both the states—one Islamic and the other typically indigenous, based on the Aryan concept of political traditions.

De facto recognition in Mediaeval India

"*De facto*" recognition in the middle ages, as today, must have been a question of realities, based on the existence of a fact which could not be denied and hence compelled acceptance. Babur gives a graphic account in his memoirs of the political condition of India in 1526 A.D. when he had to reckon with no less than five independent kingdoms. The account given by Babur is such as to lead one to the conclusion that he had to recognise these political units with which he had to establish inter-state relations, both in peace and war. The relevant extract from *Tuzak-i-Babari* is given below as it establishes the principle of *de facto* recognition of states on the basis of their physical existence, and no enunciation of Islamic theory to the contrary could deprive them of their recognition in mediaeval India:—

> "The Capital of all Hindustan is Delhi. From the time of Sultan Shahabu-d-din Ghori to the end of Sultan Firoz Shah's time, the greater part of Hindustan was in the possession of the Emperor of Delhi. At the period when I conquered that country five Musulman kings and two Pagans exercised royal authority. Al-

14. King, *Memoirs of Babur*, II. p 254.

though there were many small and inconsiderable *Rais* and *Rajas* in the hills and woody country, yet these were the chief and the only ones of importance. One of these powers was the Afghans, whose Government included the capital, and extended from Bahrah to Behar. Jaunpur, before it fell into the power of the Afghans, was held by Sultan Hussain Sharki. This dynasty, they called the *Purbi* (or eastern). Their forefathers had been cupbearers to Sultan Firoz Shah, and that race of Sultans. After Sultan Firoz Shah's death, they gained possession of the kingdom of Jaunpur. Delhi was at that period in the hands of Sultan Alau-ddin, whose family were *saiyids*. When Timur Beg invaded Hindustan, before leaving country, he had bestowed the country of Delhi on their ancestors. Sultan Bahlol Lodi Afghan, and his son Sultan Sikander, afterwards seized the throne of Delhi, as well as that of Jaunpur, and reduced both kingdoms under one government.

"The second prince was Sultan Muhammad Muzaffar, in Gujarat He had departed this life a few days before Sultan Ibrahim's defeat. He was a prince well skilled in learning and fond of reading the *hadis* (or traditions). He was constantly employed in writing the Kuran They call this race Tang. Their ancestors were cupbearers to the Sultan Firoz that has been mentioned, and his family. After the death of Firoz Shah, they took possession of the throne of Gujarat.

"The third kingdom is that of the Bhamanis in the Dekhin, but at the present time the Sultans of the Dekhin have no authority or power left. All the different districts of their kingdom have been seized by their most powerful nobles; and when the prince needs anything, he is obliged to ask it of his own *amirs*.

"The fourth king was Sultan Mahmud, who reigned in the country of Malwa, which they likewise call Mandu. This dynasty was called the Khilji. Rana Sanka, a Pagan, had defeated them and occupied a number of their provinces. This dynasty also had be-

come weak. Their ancestors, too, had been originally brought forward and patronised by Sultan Firoz Shah, after whose demise they occupied the kingdom of Malwa.

"The fifth prince was Nusrat Shah, in the kingdom of Bengal. His father had been king of Bengal, and was a *saiyid* of the name of Sultan 'Alau-d-din. He had attained this throne by hereditary succession It is a singular custom in Bengal, that there is little of hereditary descent in succession to the sovereignty. There is a throne allotted for the king, there is, in like manner, a seat or station assigned for each of the *amirs, wazirs* and *mansabd'ars* It is that throne and these stations alone which engage the reverence of the people of Bengal A set of dependents, servants, and attendants are annexed to each of these situations When the king wishes to dismiss or appoint any person, whosoever is placed in the seat of the one dismissed is immediately attended and obeyed by the whole establishment of dependents, servants, and retainers annexed to the seat which he occupies Nay, this rule obtains even as to the royal throne itself. Whoever kills the king, and succeeds in placing himself on that throne, is immediately acknowledged as king; all the *amirs, wazirs,* soldiers, and peasants, instantly obey and submit to him, and consider him as being as much their sovereign as they did their former prince, and obey his orders implicitly. The people of Bengal say, "We are faithful to the throne; whoever fills the throne we are obedient and true to it." As for instance, before the accession of Nusrat Shah's father, an Abyssinian, having killed the reigning king, mounted the throne, and governed the kingdom for some time. Sultan Alau-d-din killed the Abyssinian, ascended the throne, and was acknowledged as king After Sultan 'Alau-d-din's death, the kingdom devolved by succession to his son, who now reigned There is another usage in Bengal; it is reckoned disgraceful and mean for any king to spend or diminish the treasures of his predecessors. It is reckoned necessary for every king, on mounting the

throne, to collect a new treasure for himself. To collect a treasure is, by these people, deemed a great glory and ground of distinction. There is another custom, that *parganas* have been assigned from ancient times to defray the expenses of each department, the treasury, the stable, and all the royal establishments; no expenses are paid in any other manner.

"The five kings who have been mentioned are great princes, and are all Musulmans, and possessed of formidable armies. The most powerful of the Pagan princes, in point of territory and army, is the Raja of Bijanagar. Another is the Rana Sanka, who has attained his present high eminence, only in these later times, by his own valour and his sword. His original principality was Chitur. During the confusion that prevailed among princes of the kingdom of Mandu, he seized a number of provinces which had depended on Mandu, such as Rantpur (Rantambhor), Sarangapur, Bhilsam, and Chanderi. In the year 934 by the divine favour, in the space of a few hours, I took by storm Chanderi, which was commanded by Maidani Rao, one of the highest and most distinguished of Rana Sanka's officers, put all the Pagans to the sword, and from the mansion of hostility which it had long been, converted it into the mansion of the faith, as will be hereafter more fully detailed. There were a number of other *Rais* and *Rajas* on the borders and within the territory of Hindustan; many of whom, on account of their remoteness, or the difficulty of access into their country, have never submitted to the Musulman kings."[15]

JURISDICTION

According to Islam, the jurisdiction of a state comes to rest upon the religion of the individual irrespective of his territorial allegiance, since Shafi recites: "Islam is binding on the Muslim wherever he may be...for (the duty) of worship is not

15. Elliot and Dowson, *History of India as told by its own Historians,* Vol. IV, 1872, pp. 259 262.

waived if he is in the land of the infidel."[16] Though the concept of the state ever since its birth has always been territorial, the impact of religion appears to have shaped the basis of jurisdiction in Islam. However, the territorial aspect could not be completely eradicated. The jurisdiction of a state whether ancient, mediaeval or modern is essentially threefold in its exercise, namely: (1) it extends over an area of land comprising the territory of the state, (2) secondly, it exists over individuals and things within those limits, and (3) lastly, the modern state has developed a somewhat well-defined jurisdiction over the territorial sea and in certain restricted circumstances on the high seas also which aspect does not appear to have developed in the middle ages. Once the two basic elements of the land and the people are accepted, the interest of the state in its citizens abroad has also to be accepted, which was so predominantly brought out in the Islamic concept of the jurisdiction of the state Though "Muslim law binds individuals and not territorial groups,"[17] it would perhaps be not quite correct to minimise the importance of the territorial aspect by asserting that non-Muslims of an Islamic state were not bound to obey the law of that state Even if all non-Muslims of an Islamic mediaeval political unit were accepted as foreigners, they were nevertheless subject to the jurisdiction of the Islamic state to an extent much more than the alien residents of a modern state could ever be. The mediaeval state was all-powerful in relation to the individual and since the concept of the state then was theocratic, there was much more interference in the private rights of the individual than today. In fact, the treatment meted out by the mediaeval state to a *Kufr* (mis-believer) or a *Murtadd* (apostate), both residents of an Islamic state, was severe in the extreme and bore no comparison to that accorded to a believer (*Iman*) of the mediaeval state, much less to an alien of the modern state. Thus, by and large, the jurisdiction of the Islamic state over all citizens residing within its boundaries, irrespective of religious considerations, was supreme in the middle ages and existed over

16 Sha'fi Abu Abd Allah Muhammad Idris, *Kitab al-Umm*, Vol. I. Cited by Khadduri, *op. cit.*, p. 147.

17. Khadduri, *ibid.*

Muslims and non-Muslims alike to the extent of imposing even the death penalty. It was because the Empire of the Caliph was essentially based on religion that jurisdiction came to be exercised over the followers of the faith and extended wherever these followers went, but this did not restrict the supreme right of the Islamic state to exercise jurisdiction over the Muslims only, to the exclusion of non-Muslim residents of the state.

What constituted an Islamic State ?

In an age when the guiding principle was *cojus regio ejus relegio*, it was not very difficult to determine which political unit was guided in matters of jurisdiction by principles of Islamic law and which was not. In order that a Muslim territory may constitute an Islamic state, the test was whether the believer was able to fulfil freely the obligations of his religion. The determining factor was whether or not Muslim authority prevailed over the land with the result that the prayers could be said in the presence of the *Wali* (representing the Caliph) whose existence in the state was as essential as that of the *Qadi* who administered the law. It was believed that if these conditions were fulfilled, it was not of much consequence whether the ruling authority was Muslim by faith or not. It was, therefore, a Muslim belief in India even during the British domination, that since the *Qadi* existed, along with complete individual freedom to offer prayers in the name of the Caliph, the territory remained a Muslim state even though under the sovereignty of Great Britain. Thus, a state in the middle ages exercised jurisdiction over the different communities which lived within its territories, depending upon the religion they professed. This was the inevitable result so long as religion remained the essential basis of jurisdiction. The following, therefore, were the distinguishing features of the concept of jurisdiction of an Islamic state over its citizens and foreigners:

(1) The criminal and civil jurisdiction of the state differed on the basis of the faith of the individual citizen;

(a) if he was a believer, according to the classical

concept, the Islamic state or the Caliph exercised jurisdiction over him wherever he went;

(b) if he was a non-believer, his position depended upon the category to which he belonged.

(2) The jurisdiction of the state over the individual also depended upon the nature of the Muslim territory wherein he resided.

The position in theory differed radically from practice, particularly in the context of mediaeval India, where the Delhi Sultanate and the Moghul Empire accepted the Hindu as a citizen of the state in more ways than one. However, an attempt is made first to describe the theory and the position, based essentially on Islamic concepts outside India. The Indian practice in the middle ages is mentioned subsequently.

A. GENERAL POSITION IN ISLAMIC STATES

Jurisdiction of the Islamic State over individuals according to their faith

If it was once accepted that the supreme authority of the state professed the Muslim faith, the nature of the jurisdiction of the mediaeval state over the individuals residing within the limits of that state depended upon whether the individual concerned was:—

(a) a believer or (*Iman*).

(b) a non-believer or (*Kufr or Kafir*).

(c) an apostate or (*Murtadd*).

While the believer enjoyed a privileged position, the *Kufr* (*Kafir*) and the *Murtadd* could be subjected to death penalty for non-acceptance of the true religion. For example, the punishment to be meted out to a *Kafir* ranged "from full damnation and eternal fire in the next life to partial earthly punishment."[18] Again, both jurists and theologians agree that apostasy amounted to a clear violation of the law and was, therefore, punishable

18. See Hilli, *Al-Babu'l Hadi 'Ashar,* translated by W. Miller (London 1928), pp. 7-8.

both in this world and the next. In short, therefore, while the *Kafir* could live in a Muslim state but had to remain ever-prepared to receive his share of punishment, the existence of the *Murtadd* was not to be tolerated since before his execution, he was to be given the option to choose between Islam and death and do so within three days of the notice of the warning given[19] to him. The Prophet is reported to have said, "He who changes his religion must be killed."[20] The killing of the *Murtadd* was done by sword and not by burning since God alone punished by fire. This was the position according to the classical concept of the Islamic state of the middle ages.

Of the above-mentioned three classes of individuals, the believer and the apostate or *Murtadd* who at one time was a Muslim could be regarded as regular citizens of the Islamic state, even though by inference the non-believer or *Kafir* may not be so. In actual practice, however, since Muslim states had large minorities of non-believers residing side by side with believers and particularly when the *Kafir* was not subject to capital punishment *ipso facto* as the *Murtadd* was, it could perhaps be argued that all these three categories were subjects of the Islamic states although enjoying different rights and privileges in relation to the state. If the *harbi* and the *must'amin*, described below, were not citizens of the Islamic state, a *dhimmi* who paid taxes could not be wholly treated as an alien.

In addition to the above-mentioned subjects of the Islamic state, there were a large number of foreigners either transiting Muslim territory or residing temporarily therein, with peaceful motives, which aspect is briefly summarised below.

Foreigners in Muslim Territory

The types of individuals who did not possess full legal capacity and were not *de jure* citizens of the Islamic state were:

(a) *Harbi;*

(b) *Musta'min;*

19. Malik, *Al-Muwatta*, Vol II, p. 117.

20. Abu Da 'ud, *Sunan*, 1935, Vol. IV, p. 126. See Khadduri, *op. cit.*, p. 147, *et. seq.* for a full discussion of these precepts.

(c) The *Dhimmi* was perhaps somewhat of a naturalised subject so long as he paid the taxes prescribed for the non-believer.[21]

(a) *Harbi.* The *Harbi,* as the word denotes, was a resident of *Dar-al-harb,* an area or territory with which Islam was perpetually at war. There were two different classes of *harbis,* namely, those who believed in scriptures and those who were idolators and polytheists. The treatment prescribed in theory for the *harbi* who belonged to the polytheist or idol-worshipping class has been laid down in a *Quranic* injunction which reads as follows: "Slay the polytheists wherever ye may find them."[22] On the other hand, if the *harbi* was a Christian or a Jew believing in scriptures, he could not be subjected to capital punishment but could legitimately be enslaved or kept as a prisoner of war. The practice of Islamic states, however, differed and all classes of *harbis* could generally enter the Islamic state without being molested, provided a certificate of safe conduct known as *Aman* had been obtained.

(b) *Must'amin* The word *Musta'min* stands for one who is secure or rendered safe and since this was possible in the case of the *harbi* by obtaining the certificate of safe conduct or *Aman,* the *Musta'min* as a class was permitted to remain unmolested in an Islamic state However, the duration of the *Aman* was restricted to one year and the *Musta'min* category, therefore, constituted a transitory population which either walked out of the Islamic state after one year or agreed to pay the taxes specially designed for the non-believers, such as the poll tax, and when they did so, they degenerated into the position of *Dhimmi* As

21 Khadduri (p 162) regards all three including the *Dhimmi* as devoid of legal capacity The position of the "*Dhimmi*" may however, be regarded on the border line of the concept of citizenship and that of an alien It in theory Khadduri is right in including the *Dhimmi* in the category of aliens, the Indian practice of the middle ages would appear to accord him many of the rights of a citizen, if not all those accorded to the believer The Indian practice as distinct from the theory is explained *infra.*

22. *Quran,* I, X, 5; See also Khadduri, *op cit.,* p. 156.

the *Musta'min* class was entirely dependent on the certificate of safe conduct, or *Aman*, it may be mentioned here that usually it was the individual man or woman who was granted this certificate and very rarely was it extended to the population of a particular territory. For example, the Hanbali school was against the grant of *Aman* to the inhabitants of the whole country or a big city. According to this school, small towns could alone be given the privilege of safe conduct by the grant of *Aman*. However, it was the Imam or one of his representatives who could give official *Aman* to the population of a territory or even to individual *Harbis*. The Imam could also repudiate the *Aman* and expel the *Musta'min* if he was abusing his rights.

The rights and obligations of the *Musta'min* were prescribed by law. While he could not visit Mecca or Medina, he was permitted to travel wherever he liked in the cities of *Dar-al-Islam*, along with his family and children. He could marry only a *Dhimmi* woman and if he paid taxes such as *jizya*, he himself became an acknowledged *Dhimmi*. A *Musta'min* could also enter into business transactions, but within the limits of the law. If he committed a crime his *Aman* remained valid, but he was himself liable to punishment.

The institution of *Aman* was indeed helpful in bringing about intercourse amongst states, particularly with those belonging to *Dar-al-Harb*. It was by virtue of *Aman* that Muslims and non-Muslims could travel in the states of one another. As time grew and inter-state relationship developed in the middle ages, it is possible that the grant of *Aman* may have served the purpose of a passport.

(c) *Dhimmis. Status of Dhimmis.* As stated earlier, the non-Islamic communities tolerated within the Islamic state were those which were governed by the book or scriptures. The so-called idolators and fire-worshippers were also protected provided they accepted residence in a Muslim state outside the Arabian peninsula. Abu Yusuf has brought out this fact in the *Kitab al-Kharaj*.

A *Dhimmi*, as long as he was attached to his religion, was subject to his own laws except when he came in conflict with Muslim interests or himself voluntarily sought the assistance of a

Muslim Divine or a court of the Islamic state. The Medina Treaty of 623 A.D. concluded between the Aws and Khazraj tribes, to which the Jews also became a party subsequently, indicates that religious toleration was granted to the Jews. The Treaty provided that "the Jews shall have their own religion and the Muslims their own religion." However, the Jews were required to contribute towards the expense of the battle when they fought with the believers against the non-believers, but Jews could not be compelled to join the armed forces and to take part in war. No tribute or any other kind of disability was imposed on them.

Muhammad had agreed to a similar arrangement with the Christians of Aqaba, except in regard to payment of certain taxes The Prophet himself wrote a letter to the Christian Chief of Aqaba in which he posed the problem: "accept Islam or pay the *jizya*". In India, it is well known that the non-Islamic population was required to pay not only *jizya* but also *kharaj* and a couple of other kinds of taxes which are described subsequently However, Akbar abolished the levy of *jizya* altogether in India

The rights and obligations of Dhimmis The law governing the relations of the non-Muslim with the Muslim subjects of the Islamic state was derived from *Quranic* precepts as well as decrees of the Caliphs. The authority of the Islamic State guaranteed the security of lives, property and practices of the *Dhimmis* provided they did not build their own religious institutions. This applied to the Christian subjects of an Islamic state, rather than to the idolators.

A *Dhimmi* was subjected to no less than 12 duties as well as disabilities according to the theory of the Islamic state. The first six of the following duties were categorised as absolutely necessary and a breach of them meant that the state would refuse to provide security and safety. The other duties were desirable and their violation only entailed penalties. These twelve duties[23] may be described briefly as follows:

23. Khadduri, *op. cit.*, pp. 196-198; for details see T W Arnold, *The Preaching of Islam*, 1935, p. 197.

(1) Every *Dhimmi*, if a male and adult, was under an obligation to pay *jizya*. The quantum of the tax was to be fixed by the authority of the Islamic state.

(2) No *Dhimmi* could attack a Muslim. He was forbidden from showing any kind of disrespect to Muslim religious practices.

(3) A *Dhimmi* could not by law show disrespect to the Prophet or to the *Quran*.

(4) No *Dhimmi* had a right to injure the life or the property of a Muslim under any circumstances.

(5) A *Dhimmi* could not be permitted to marry a Muslim woman.

(6) A *Dhimmi* could not be permitted to assist the enemy or to give refuge to a foreigner.

(7) A *Dhimmi* could not enter into business transactions with Muslims. For example, he could not sell wine or practise usury.

(8) A *Dhimmi* was required to wear distinctive clothing, *e.g.*, a yellow patch on the dress.

(9) A *Dhimmi* was not permitted to ride on horseback or carry weapons.

(10) A *Dhimmi* could not have his house higher than the Muslim houses.

(11) A *Dhimmi* could not ring the church bells loudly.

(12) Their dead could not be wept over loudly and had to be buried in places away from Muslim quarters.

In actual practice, though some Caliphs and Governors went out of their way to be harsh, there were others who were magnanimous and kind-hearted and did not enforce the above duties ruthlessly. The state practice in mediaeval India may also be described likewise, inasmuch as the earlier Sultans of Delhi, particularly Alaudin Khiljji, were very harsh in their treatment of the *Dhimmis*. However, in the reign of Akbar, *Dhimmis* were treated on a basis of equality with Muslim subjects and even

jizya, which was a customary tax prescribed by Muhammad himself for all non-Muslims residing under Islamic authority, was abolished, as stated earlier. The main features of the Indian state practice are briefly summarised below.

B. STATE PRACTICE IN MEDIAEVAL INDIA

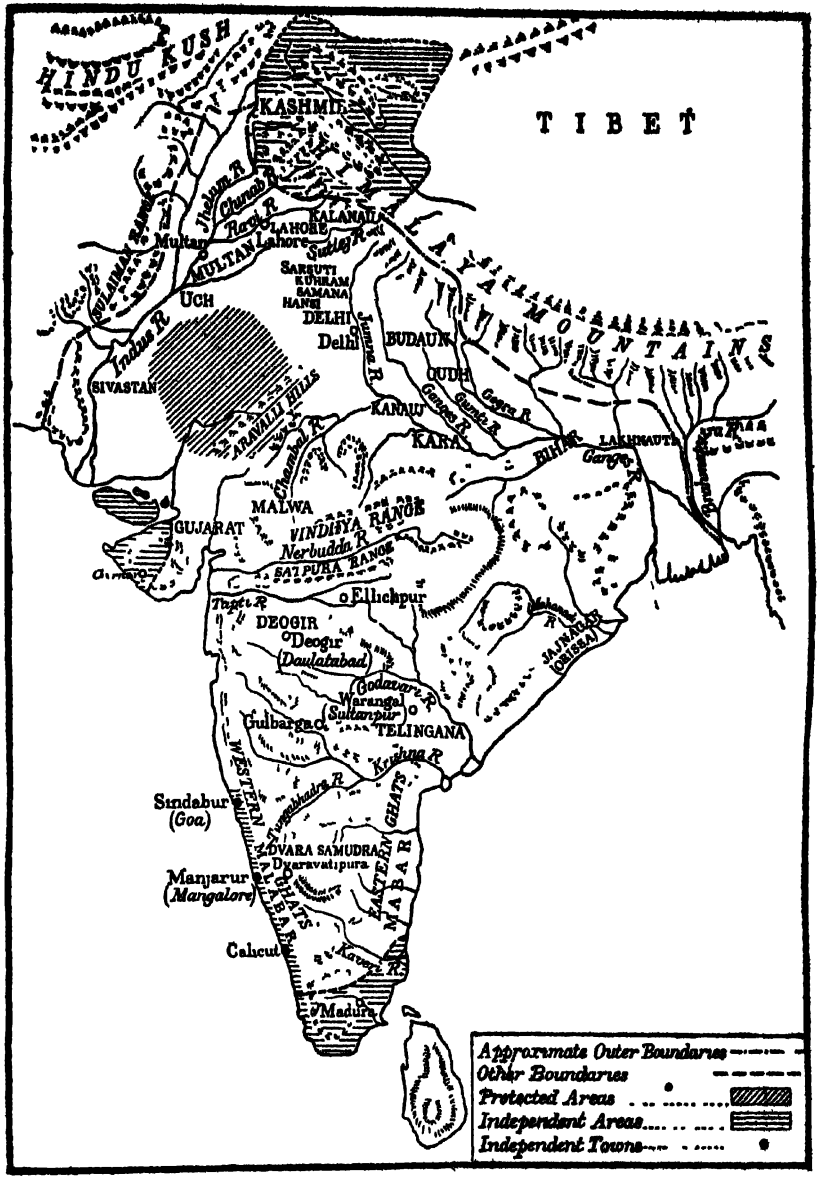
In regard to the jurisdiction exercised by the mediaeval Islamic state in India over its subjects, both believers and non-believers, there is a wide divergence in state practice, inasmuch as several sovereigns showed great kindness and generosity to the "*Zimmis*" or non-believers whereas there were others who were quite unkind. For example, in the early days of the Moghul Empire, we have an account of a contemporary historian describing how Emperor Babur treated the local inhabitants of the territories he conquered. The account given in *Tarikh-i-Sal'atin-i Af'aghana*, which is reproduced below, may be considered relevant:—

> "When His Majesty arrived at Sonpath, the chiefs and *chaudharis* of the city, together with the soldiers and bankers and other classes, went to visit him and were treated with honour and kindness. During the first two months of His Majesty's reign, he behaved to everyone with such kindness and generosity, that dread and terror were banished from the hearts of all men, so that they were well disposed towards his government. He remained a month and some days in the neighbourhood of the fort of Indrapat, on the banks of the river Jumna, and reposed himself there, as it was a pleasant and agreeable spot."[24]

The above account gives a picture quite different from what one gets in the reign of Alauddin Khilji (1294-1316 A.D.).

Again, the grandson of Babur, Emperor Akbar, revolutionised the concept of the status of the *Zimmis*. He not only employed Hindus in the Imperial service, but also raised them to great dignity and status. Raja Todar Mal, a khatri of *Oudh*, became one of the most celebrated and illustrious administra-

24. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. V, pp. 34-35.



Subjects of Inter-State Law In Mediaeval India—Tughlaq Empire (14th Century A.D.)

Apart from the Empire of the Tughlaqs, there were several autonomous States having inter-state intercourse following Islamic and or Aryavarta tenets to regulate their relations.

tors and generals of the Moghul Empire. Akbar accorded the most tolerant treatment to the Hindus, conciliated the Rajput states and clans and himself married a Rajput princess from Jodhpur. In the year 1565 A.D., Akbar put an end to the poll tax on Hindus which was introduced for the first time by Alauddin Khilji. He thus brought his Muslim subjects to parity with the non-Muslims. This is a clear indication of the fact that the theory and practice of Islamic states in regard to the jurisdiction they exercised over non-Muslim subjects in Arabia and elsewhere was completely disregarded in India during the regime of the Moghul Emperor Akbar.

The employment of non-Muslim subjects in the higher organs of the state was a feature of Sher Shah's reign as well. Mohammad Shah is known to have employed Himu, a *Vaish* shopkeeper of the town of Riwari. He was made superintendent of the markets first and rose to become the Chief Minister later.

Salim Shah, son of Sher Shah, is known to have issued to his administrative officers in the districts, detailed instructions which were essentially based on fair and equal treatment to all communities, even though such practice may not have been in accordance with the *Ulema* or strict canonical law *Tarikh-i-Badauni* makes a mention of these circular orders in the following terms:—

> "Circular orders were issued through the proper channels to every district, touching on matters religious, political and fiscal, in all their most minute bearings, and containing rules and regulations, which concerned not only the army, but cultivators, merchants, and persons of other professions, and which were to serve as guides to the officials of the state, whether they were in accordance with the Muhammadan law or not—a measure which obviated the necessity of referring any of these matters to Kazis or Muftis."[25]

However, there were several Sultans of Delhi such as Alauddin Khilji, Firuz Tughluq, Muhammad Tughluq, as well as the

25. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. V, p. 487.

Moghul Emperor Aurangzeb, who believed in enforcing the principles of *Ulema* in regard to the jurisdiction of the state over non-Muslim subjects. In the reign of Mohammad bin Tughluq, the Chinese Emperor requested if he could build a temple or *samhal*, a place of pilgrimage, in the Himalayan area frequented by the Chinese which the Muslim army had seized, sacked and destroyed. The Sultan, who readily accepted the rich presents sent by the Chinese Emperor, replied back stating: "Islam does not allow the furthering of such an aim and the permission to build a temple in Muslim country can be accorded only to those who pay the *jizya*."[26] In the days of Alauddin Khilji, it is known that *Qazi Mughisuddin* had gone a step further in asserting that it was not lawful to accept *jizya* from Hindus as they had neither a Prophet nor a revealed book and the option to be posed to them was, therefore, either Islam or death. However, Allauddin Khilji did not accept this doctrine inasmuch as he enunciated the supremacy of the theory of *raison d'etat*. He stated in categorical terms to the expounder of Muslim law: "I do not know whether this is lawful or unlawful; whatever I think to be for the good of the state or suitable for the emergency, that I decree and as for what may happen to me on the approaching day of judgment that I know not."[27] This was a new doctrine of sovereignty which did not acknowledge the supremacy of the *ulema*. It worked both ways inasmuch as it meted out a very severe treatment to the inhabitants of the Doab, particularly the non-Muslims, who were subjected to heavy taxation, whereas at times it permitted the Sultan to ally himself with a non-Muslim, if the emergency so warranted. Thus when Sultan Ghiyasuddin Balban proceeded to Bengal in 1297 A.D. to chastise the rebellious Tugril Khan, he did not hesitate to enter into an alliance with the Hindu king of Eastern Bengal, Rao Danuj. The manner in which Balban suppressed the rebellion and treated Tugril Khan indicates that in mediaeval India the sanctity of the *Quranic* injunction "never should a believer kill a believer" (*Sura* IV, 92), was often violated in the higher interests of the state. Thus not only Tugril Khan but his relations and accomplices were

26. See *The Cambridge History of India*, Vol III, 1928, p. 163.
27. See Ishwari Prasad, *op. cit.*, p. 121, *et seq.*

placed on gibbets erected on both sides of the bazaar and their bodies hanged mercilessly until they rotted and fell on the ground in pieces. The state and its administration is, however, governed by principles which could not, even in the middle ages, respect religion always. The higher forces and principles which the state sets in motion were thus destined to override the *Quranic* principles and the earlier Islamic practices of Arabia. If the state is to exist and flourish, *raison d'etat* has to be the supreme and overriding consideration and not the injunctions of any holy book. The state practice of mediaeval India thus often departed from the *Quranic* injunctions and what has been described earlier as Islamic state practice in Arabia and regions outside India could not be said to hold good in regard to the state practice of mediaeval India.

ORGANS OF STATE FOR THE CONDUCT OF INTER-STATE RELATIONS AND THE METHODS ADOPTED FOR INTER-STATE INTERCOURSE

Islamic Concept and Practice of Diplomacy

According to Khadduri, the concept of diplomacy in Islam 'was not essentially for peaceful purposes as long as the state of war was regarded as the normal relation between Islam and other nations'[28] Whatever may have been the position in strict theory, there is ample historical evidence to indicate that Islamic states sent or received diplomatic missions or envoys for peaceful purposes also in relation to both Islamic and non-Islamic political units. However, it was particularly so in the conduct of inter-state relations among Islamic political units and is borne out by the exchange of envoys among Central Asian monarchs such as Babur and the Shah of Persia in the early 16th century A.D., about which more is said later. In mediaeval India, there are instances of exchange of envoys between Islamic and non-Islamic states for various purposes such as seeking friendship or alliance or military assistance prior to war. For example, Rana Sanga sent emissaries to Babur to seek the latter's alliance against Ibrahim Lodi prior to the battle of Sikri in

28. Khadduri, *War and Peace in Law of Islam*, 1955, p. 239.

1527 A.D. It may be true that the practice of diplomacy in Islam blossomed with reference to peaceful purposes after the Abbasid period when the concept of *Dar-al-Islam* being at war with *Dar-al-Harb* had, in the light of practical experience, been considerably modified. However, even in the earlier period, the peaceful aspect of diplomatic missions was lacking neither in the inter-state relations within the Islamic world nor in the intercourse of Islamic states with non-Islamic political units. In theory, the position was perhaps different and a brief mention of the theoretical aspect is necessary before describing the state practice of the middle ages.

According to the *Quranic* theory which was practised in the early stages of the expansion of Islam, diplomacy served as a handmaid for the spread of the Faith. It was used to deliver the message of Islam generally before fighting began. Thus the text of the message sent by Prophet Muhammad to the Byzantine Emperor prior to war read as follows:—

> "In the name of Allah, the Compassionate, the Merciful.
>
> "From Muhammad, the Apostle of Allah, to Heraclius, grand chief of the Rum [Byzantines].
>
> "Peace be on those who follow the Truth. (It is my duty to) call you to Islam, in the name of Allah. Be a Muslim, and you will be safe; for Allah will compensate you double the merits. And you, People of the Book, will find the same words [of God] among us. Let us worship no other god than Allah nor adopt other gods besides him. If you believe, then say: 'We are Muslims,' if not, you will be responsible for the sins of your people...."[29]

As inter-state relationship developed not only amongst Islamic states but also with the non-Islamic world, emissaries were used not only before war was declared but also subsequently for exchange of prisoners or for concluding peace. Moreover, the technique of negotiating alliances with neighbouring powers developed to such an extent that Indian history is full of instances where Isla-

29. See Khadduri, *op. cit.*, pp. 241-242.

mic states sought the aid of Aryan states and *vice versa*. Thus, further development of the concept of diplomacy in Islam came to rest on growing state practice rather than on any theoretical exposition of the subject.

Organs of State for the Conduct of Inter-State Relations

As it is of the very essence for the success of inter-state relationship that the organ or the individual representing a state be fully and effectively capable of committing the totality of that state in its relations with others, it has been the time-honoured practice of states from ancient days to accept the Head of a political unit alone as competent to discharge this function. The Head of the state constitutes the highest organ and hence could alone inspire confidence among other states that he represented and could commit the totality of his state. Thus ratification of any arrangement or agreement negotiated between states became an essential feature of the conduct of inter-state relationship since Heads of states met very rarely and the normal practice was to send emissaries, envoys and missions whose word could not be accepted unless ratified. The modern concept of international law which recognises the Head of state as its chief organ and representative in the totality of its international relations existed in almost all its aspects in the middle ages including the mediaeval period of Indian history.

However, he modern practice of a foreign office or a minister for foreign affairs exclusively dealing with external relations of the state was perhaps unknown in Central Asia as well as in mediaeval India. The Head of state, who was almost invariably a monarch in mediaeval India, was assisted by a Vazir and a number of councillors who held the portfolios of Finance, the Army, Revenue, etc., and the conduct of inter-state relations was a subject discussed by the king with all his councillors or his trusted inner cabinet depending upon the importance of the matter under consideration. A possible example in regard to a regular permanent organ of the state dealing exclusively with foreign affairs comes from the kingdom of Deccan founded by Bahman Shah, about 1347 A.D. Bahman Shah was succeeded by Mohammad the First who was known to be a diligent and

methodical administrator with a flair for organising ministries as well as provincial administration. His political organisation was imitated by the smaller states in the South and is known to have served as a model in that region for some decades of the 14th century A.D. Mohammad had divided his administration into eight ministries among which there was the *Vazir-i-Ashraf* or the Minister of Foreign Affairs and Master of Ceremonies. This is a concrete illustration we have of the existence of a minister for foreign affairs and hence it may be worth mentioning the eight ministries which flourished in the kingdom of the Deccan in the latter half of the 14th century A.D.

"(1) *Vakil-us-Saltanah,* the Lieutenant of the Kingdom;

(2) *Vazir-i-Kull,* the Superintending Minister;

(3) *Amir-i-Jumlah,* the Minister of Finance;

(4) *Vazir-i-Ashraf,* the Minister of Foreign Affairs and Master of Ceremonies;

(5) *Nazir,* the Assistant Minister of Finance;

(6) *Pishva,* who was associated with the Lieutenant of the Kingdom, and whose office was in later times almost invariably amalgamated with his;

(7) *Kotwal,* the Chief of Police and City Magistrate in the capital; and

(8) *Sadr-i-Jahan,* the Chief Justice and Minister of Religion and Endowments."[30]

In the political organisation of the Delhi Sultanate (1200 to 1500 A.D.) as also the Moghul Empire (1500 to 1700 A.D.), there was a portfolio of Master of Ceremonies but no specific mention is made of foreign affairs being associated with it. It could not, therefore, be stated with any accuracy that the holder of this office of Master of Ceremonies exclusively performed the functions which fall to the lot of a Minister for Foreign Affairs today. However, there can be little doubt that the Master of Ceremonies must have dealt with foreign monarchs or their envoys or

30. See *Cambridge History of India,* Vol. III, Chap. XV by Wolseley Haig, p. 377.

missions with a view to looking after their comfort. Even so, the Master of Ceremonies must primarily have been concerned with the courts and ceremonials of the monarch he served rather than the visiting princes and dignitaries of foreign states.

Apart from the Islamic political units which existed in India, the non-Islamic states of *Aryavarta*, primarily guided by ancient Indian practice, also did not have a Minister for Foreign Affairs though the Head of the state discharged, in consultation with his councillors, the function of conducting inter-state intercourse effectively and efficiently. Thus Shivaji's concept of *ashtapradhan* or eight ministers during the Moghul days indicates that external relations formed a necessary function of the state but there was no minister exclusively devoted for the conduct of intercourse among states. This was perhaps inevitably so in that state of development. Even the elaborate civil organisation devised by the Moghul emperors did not have one minister exclusively assigned the specific portfolio of foreign relations. Thus it could be concluded that apart from the Head of the state who constituted the exclusive organ for the conduct of inter-state relationship, there were ministers who may have been consulted in this regard but there was no officer of the state known or designated as Foreign Minister in the modern sense, to deal with external relations of the mediaeval state.

Methods Adopted for the Conduct of Inter-State Relations

As in ancient India, the institution of envoys or the sending of diplomatic missions was common in mediaeval India as well as in Central Asia of that period. The practice of establishing permanent embassies in states was perhaps unknown. The embassy of Sir Thomas Roe duly approved by King James I (1615 A.D.) though permanent in certain respects was essentially for an *ad hoc* purpose, *i.e.*, to negotiate a trade agreement with the Great Moghul. Apart from this formally accredited ambassador, of whom special reference is made later, there is no example in mediaeval India of a regular Embassy in the modern sense of the term. In early mediaeval India, there is not one precedent available of a state having sent its mission on a permanent basis to another state. There are illustrations

of missions having stayed for several months but they came for a specific purpose and they returned after that appointed function had been performed. The same would appear to be the position in the Central Asia of the middle ages, except for a solitary example we have of the Shah of Persia appointing a more or less permanent representative to the court of Samarkand after installing Babur as the ruler of that state. The circumstances which led to the sending of this permanent embassy are revealing and if a correct appreciation is to be made of what prevailed in those days, it would be worthwhile reproducing the story as told by Emperor Babur himself in his memoirs. The practice of sending envoys for negotiating terms, their immunity, the manner in which messages were exchanged by monarchs through them, are all brought out in the conquest of Samarkand by Babur with the assistance of Shah Ismael of Persia The narrative given by Professor Rushbrook Williams in his *An Empire Builder of the 16th Century*, based upon contemporary accounts of Mirza Haider in *Tarikh-i-Rashidi* and the memoirs of Babur, runs as follows:

> "Shaibani, the arrogant, the faithless, the cruel, had in the height of his power gone one step too far, and had aroused the enmity of the terrible Shah Ismael Safawi, monarch of a rejuvenated Persian empire and champion of the Shia sect The story of the quarrel between the two men is among the most famous tales of Eastern history Some of Shaibani's troops had plundered the borders of Shah Ismael's dominions To the envoys sent to demand redress, Shaibani returned an insulting answer, despatching moreover to Ismael a beggar's dish in allusion to the sanctified poverty which had always marked the family from which the Shah claimed descent Ismael received the taunts of the Uzbeg leader with feigned humility, saying that he proposed to make a pilgrimage to the shrine of the holy Imam Reza, and that he hoped to take the opportunity of waiting upon the Khan. In return for his present, he sent him a spindle and a distaff, with the message: 'Lo, I have tightened my girdle for a deadly contest, and have plac-

ed the foot of determination in the stirrup of victory. If thou wilt meet me like a man, face to face in battle, our quarrel will at once be decided. But if thou would'st rather slink into a corner, then thou mayest find what I have sent thee of some use.'

"Shah Ismael was as good as his word. He set his armies in motion, took his foe by surprise, and drove Shaibani into Merv, a city in the north of Khorasan He defeated a covering force, and then laid siege to the town But finding that the Uzbeg garrison, headed by Shaibani, were making a spirited resistance, he resolved on a ruse. He wrote that he regretted being unable to await Shaibani's convenience at present, as circumstances necessitated his withdrawal; but that he hoped to be fortunate enough to meet him on a subsequent occasion He then marched off, as though in full retreat Shaibani rushed out of Merv in hot pursuit, was drawn ten or twelve miles away from safety by a series of minor successes carefully arranged for him, and suddenly found himself between a river and the whole Persian army. The bridge behind him had been seized by a body of troops in ambush, and the Uzbeg was attacked in front by 17,000 of the famous veteran cavalry of Shah Ismael. To a contest under these conditions there could be but one issue. After a desperate resistance Shaibani's force was defeated; he and his entire following were driven into a *sarai*, where they were surrounded They perished to a man. This was at the beginning of December, 1510

"The news of the termination of the duel between Ismael and Shaibani, and of the final destruction of his dreaded rival, reached Babur before the end of the month It was communicated to him by his cousin Wais Khan, who had been for some time established in Badakhshan....He then invited Babur to join him in an attempt to recover their ancestral dominions.

"Babur needed no spur. Directly he received the news, he put Nasir Mirza in charge of Kabul, crossed

the mountains, taking with him his two little sons, Humayun and Kamran, winter though it was, and reached Qunduz and the Mirza in January 1511....

"While he was in Qunduz there suddenly came a body of Shah Ismael's troops, honourably escorting Babur's elder sister Khanzada, who, after the death in battle of her successive husbands, Shaibani and Saiyid Hadi, had fallen into the hands of the Persians. There came also at the same time an embassy from Shah Ismael, offering his friendship. Here at last were the allies for whom Babur had been looking. He promptly despatched Wais Mirza with thanks and gifts.

"Ismael received the embassy kindly, and agreed to furnish the required assistance—at a price. The price was somewhat heavy. Babur was to substitute the Shah's name for his own in the Khutba, was to stamp it on his coinage, and—most onerous of all—was to encourage the spread of Shia doctrines, throughout any conquests he made in the rigidly Sunni dominion of Samarkand. As we shall see, this last stipulation was to be the rock on which Babur's fortunes were to suffer shipwreck. Hard as they were, the terms were evidently accepted by Wais Mirza on behalf of his principal; for a small reinforcement was at once given to him, and a large body of Ismael's troops, under the leadership of Ahmad Beg Safawi, Ali Khan Istilju, and Shahrukh Sultan Afshar were ordered to hold themselves in readiness to support Babur so soon as the agreement should have been ratified....

"The Padshah now bethought himself of his new ally and overlord, Shah Ismael. Promptly ratifying the proposed agreement, he asked for speedy and effective support, expressing a hope that the whole of Transoxiana would quickly be reduced, and promising not only to stamp on his coins the images of the Twelve Imams, but even to adopt the Shia dress himself. Ismael in return despatched the powerful force which had been prepared for the purpose, and seems to have agreed

that Babur should issue coins as usual in his own name throughout his 'hereditary dominions'—that is, apparently, Farghana and Kabul. This implies that Babur was to be Shah Ismael's vassal only for such territories as might be recaptured from the Uzbegs at present in occupation of them.

"With his powerful body of allies and auxiliaries, Babur pressed straight on to Bokhara, sweeping the Uzbegs before him as he advanced. But his name was worth more than many legions to him. The people of town and countryside alike welcomed him with the greatest enthusiasm. Bokhara readily submitted, and Babur felt himself strong enough to dismiss the Persian auxiliaries with thanks and presents. They must have been uncomfortable allies, rabid Shias as they were, in that land of uncompromising Sunnis; moreover they served as a perpetual reminder of his vassalage to Shah Ismael. He would not mar the glories of his long-desired 'joyous entry' into Samarkand by their presence. *But though they went, they left behind their master's representative, Muhammad Jan, as Babur was shortly to realise to his cost.* For the moment, however, no cloud marred the sky. Nor in the hour of his triumph did Babur forget the claims of his cousin Wais Mirza, who was confirmed in the sovereignty of Hisar Shadman, Khutlan and Badakhshan.

"From Bokhara Babur went straight to the city of Timur, the scene of so many of his triumphs and despairs. It was in October, 1511, that he re-entered Samarkand, after an absence of nine years. The rejoicings of the populace were heartfelt....

"Nonetheless, the elements of disaster were already present. As Mirza Haider says:

" 'Although in the hour of necessity, the Emperor had clothed himself in the garments of the Shias, which was pure heresy, nay, almost unbelief, the people hoped that when he mounted the throne of Samarkand, and

placed on his head the diadem of the holy Sunna of Muhammad, that he would remove from it the insignia of the Shah. But the hopes of the people of Samarkand were not realised For as yet the Emperor did not feel able to dispense with the aid of Shah Ismael, nor did he feel himself sufficiently strong to cope single-handed with the Uzbeg, hence he appeared to overlook the gross errors of the Shias. On this account the people of Mavara-un-Nahr ceased to feel that intense longing for the Emperor which they had entertained while he was absent—their regard for him was at an end.'

"Mirza Haidar had laid his finger on the weak point of Babur's position in Samarkand. The Padshah, indeed, was placed in a most difficult situation. The Uzbegs were still strong, and his only hope of holding his ground, to say nothing of making head against them, lay in a close alliance either with his own Samarkand folk or with Shah Ismael and his Persians. But there were insuperable difficulties in the way of adopting either course. *Babur was a man of his word; he was pledged to the Shah, and, what was much more serious, to the support of the Shah's religion.* But he could not bring himself to incur the hatred of his own people by acting as a submissive instrument of Ismael's proselytising zeal. To assume the dress of the Shias and to stamp his coins with Shia emblems was bad enough; he refused to persecute, and persecution was the only course which could have won him real favour in the eyes of his overlord, whose barbarous treatment of pious and learned members of the opposing sect was horrifying the Sunni world. Had he been willing to throw over his alliance, all might perhaps have been well. It was not, we may believe, any considerations of danger which prevented him from doing so; *it was the fact that he had pledged his word.* Nonetheless, though he was bound to Shah Ismael, he showed an unnatural resentment at the humiliating position in which he was placed. In consequence, like James II of England in a later

age, Babur was compelled to bear all the odium of alliance with an unpopular power, while his pride debarred him from accepting the accompanying benefits. So while he became steadily less welcome to the Samarkandis through his relations with Persia, he offended the Shah by treating the Persian envoy, Muhammad Jan, with an independence and freedom which the affronted nobleman magnified into a series of studied insults. A report was transmitted by Jan to the Persian court that the new monarch of Samarkand was arrogant, faithless, and a harbourer of seditious designs against his overlord. Shah Ismael, in high dudgeon, despatched his famous commander, Mir Najim Sani, to reduce the offender to obedience."

The above description of inter-state conduct in Central Asia is illuminating in so far as it establishes that:—

(i) Envoys were sent for arranging alliances, as Babur did in his relations with the Shah of Persia.

(ii) Envoys were also used to demand redress of any grievances such as those arising out of state responsibility. Thus the Shah of Persia had sent envoys to the court of Shaibani as the latter's troops had plundered the borders of Shah's dominions.

(iii) Envoys enjoyed immunity even when relations of states were strained and strongly caustic communications were exchanged between them.

(iv) The emissaries negotiated on behalf of the Head of the state and the arrangement or agreement brought about was not implemented unless proper ratification was forthcoming. This is an important feature inasmuch as the modern principle of ratification of treaties applies not only to written agreements but also to such negotiated arrangements. Thus Babur had to ratify the arrangement negotiated by Wais Mirza on his behalf with the Shah of Persia. It was only when the ratification of Babur reached the Persian court that the implementation of the negotiated treaty or arrangement was possible.

(v) By its very nature, the institution of envoys and emissaries was not permanent in the sense that they were appointed for an *ad hoc* purpose and once they had discharged that specific function they returned to their respective countries.

(vi) Lastly, the only example we have in mediaeval Central Asian history of a permanent embassy is that of Muhammad Jan who represented the Shah of Persia in the court of Samarkand when Babur had been installed as the Head of that principality. As Babur had agreed to the conditions negotiated with the Shah for obtaining the latter's military assistance to conquer Samarkand, it was necessary for Babur to propagate the Shia faith, which was much against his will. As there were doubts entertained by the Shah of Persia after the Persian armies had left, whether Babur would fulfil the promise of propagation of the Shia faith, the representative of the Shah, Muhammad Jan, continued to remain in the court of Samarkand to enforce the terms of the treaty, which were of a permanent character and needed a permanent representative as a watchdog. Thus after the Persian armies had left Samarkand, Muhammad Jan may be regarded as an accredited representative of the Shah of Persia in the court of Samarkand, on a regular or more or less permanent basis.

(vii) The doctrine of *pacta sunt servanda*, so well known in the international law of today, was duly recognised in the sense that there was a religious obligation to respect the plighted word. This aspect is dealt with further while examining the position of treaties in mediaeval India.

(viii) As the institution of permanent embassies of the modern type was generally unknown to the age, the practice of sending envoys, emissaries and diplomatic or trade missions was indeed common and most frequently resorted to by states for conducting their inter-state relations.

Kinds and Categories of Envoys; their Functions, Privileges and Immunities

As the institution of envoys or emissaries constituted the most important, if not the only, method for the conduct of inter-state relations, the functions which the envoy was required to perform were multifarious. In accordance with the various duties assigned to envoys or messengers depending upon the circumstances in which they were sent to a foreign prince or state, the following broad classification is made, which may be of some interest:—

(1) Envoys were often sent to potentates for making alliances of various kinds. This was such a common function of the envoy, in respect of which a specific duty was assigned to him, that several illustrations could be given of how this institution was used to bring about alliances of a military character for fighting a major war against a common enemy. Thus according to *Tarikh-i-Salatin-i-Afaghana*, after the victory of Emperor Babur at the battle of Panipat in 1526 A D, "Rana Sanka, who was that time a powerful chief, sent a message to Hasan Khan, saying, 'The Mughals have entered Hindustan, have slain Sultan Ibrahim, and taken possession of the country; it is evident that they will likewise send an army against both of us; if you will side with me, we will be allies, and not suffer them to take possession.' Hasan Khan, carried away by vanity and by the Rana's message, did not send the presents which he had prepared for the Sultan (Babur), and the King's *vakil* (referring to Babur's emissary) returned home without accomplishing his purpose. These things came to the King's hearing in Agra, and Mirza Hindal and Muhammad Mahdi Khwaja, the King's son-in-law, were sent with an immense army, which was followed shortly afterwards by Babur himself."[31] This indicates that Hasan Khan Mewati, who was a sovereign prince in his own right, with a powerful army, was being approached not only by Rana Sanga but by Babur himself and the message of alliance from each of them was carried by respective envoys known as *vakils*. Even in such circum-

31. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. 5, pp. 35-36.

stances, exchange of presents and gifts was common unless the request for alliance was turned down, in which event it appears that presents were not sent, as Hasan Khan did in relation to Babur, since he accepted the offer of Rana Sanga of Mewar.

A similar incident is reported by *Tabakat-i-Akbari*. Humayun after being defeated by Sher Khan at Chausa in 1539 A.D., was marching towards the country of Raja Mal Deo of Marwar and sent (Shamsud din Muhammad) Atka Khan as his ambassador to obtain the assistance of the Raja. About the same time, it is reported, Sher Khan, the adversary of Humayun, had also sent an ambassador to Mal Deo holding out great expectations. An interesting position developed because Sher Khan had conquered Nagor and its dependencies and Raja Mal Deo of Marwar was afraid lest Sher Khan in his annoyance should send a large army to his territory to fight Humayun. It is reported by *Tabakat-i-Akbari* that "to keep the Emperor in ignorance, Mal Deo detained the envoy Atka Khan, and did not give him permission to return But Atka Khan contrived to ascertain what was passing through the mind of Mal Deo, and went off without any formal dismissal."[32] On receiving back Atka Khan, Humayun marched off at once to Amarkot where in 1542 A.D. "fortune gave him a son" no other than Akbar himself and the contemporary historians record that the child was to grow to create "an imperishable mark upon the page of time."[33] This incident also brings out an important diplomatic practice, namely, that an envoy once received in the court of a foreign state had to continue to remain in that court until he was officially permitted to depart However, when treachery was suspected, the envoy was perhaps entitled to break with this practice and to depart without official permission, as did Atka Khan from the court of Raja Mal Deo.

(2) Another function often entrusted to the envoy was to negotiate terms of settlement during warfare. It is noteworthy that the envoys who went to and fro between rival enemy

32 Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol 5, pp 211 212.

33 *Ibid.*, p 214

camps enjoyed complete immunity. Thus before the battle of Chausa in 1539 A.D., when the two armies were camped on either side of the Ganges, Sher Khan, according to *Tabakat-i-Akbari*, is reported to have "sent to the Emperor a *darwesh* named Shaikh Jalil, whom he called his *murshid*, to propose terms of peace. He offered to give up all the territory except Bengal, to swear upon the Holy Book that he would live in peace, and that the coin should be struck and the *khutba* read in the name of the Emperor. These proposals were received with the greatest satisfaction. But next morning Sher Khan fell upon the royal army unawares, and put it to the rout before it could be drawn up in array. Prior to the attack, the Afghans had taken possession of the bridge and had broken it. They also came out on the river in boats, and despatched with their spears every man of the royal army whom they found endeavouring to escape by water, Muhammad Zaman Mirza was drowned. His Majesty rode his horse into the water, and nearly perished; but he was helped over the river by a water-carrier, and went off towards Agra."[34] It appears that Sher Khan's envoy was a mere ruse of war inasmuch as he was sent to lull Humayun to sleep and to take him by surprise by attacking him the next morning.

If such envoys were sent with peace errands during warfare, they were received with the greatest suspicion by the other side. An incident is mentioned in *Tarikh-i-Salatin-i-Afaghana* when Mian Husain, one of the Chief Commanders in the army of Sultan Sikandar, seeing that there was no escape from his master the King's injustice, sent his *vakil* "to the Rana (Sanka) to inform him of his coming. The Rana was at first fearful and suspicious of Husain Khan, of whose renown he had heard. He was afraid that he meditated some stratagem. After entering into a compact, Mian Husain went to the Rana with a thousand horsemen, and the Rana sent his own nephew to meet him. After which they had an interview."[35] It appears that when parties did not trust each other they resorted to some sort of a device

34. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. V, p. 203.

35. *Ibid.*, p. 17.

as has been mentioned above. However, the *vakil* or the envoy even during war obtained complete immunity from attack or molestation, which fact is indicated from the incident of Sher Shah and Humayun as well as that of Rana Sanga and Mian Husain.

Again, Kashinath's account of the battle of Panipat, 1761, indicates that as the *vakil* of the Mahratta confederacy he could go to the rival camp of Ahmad Shah Abdali without any difficulty and enjoyed complete immunity. Even an Islamic power represented by Najibuddawlah employed a Hindu envoy, Meghraj. The *Diwan* of Bahkurdar Khan was Motilal, another Hindu. The immunity of envoys during warfare was recognized and generally acted upon and the immunity of Kashinath, an eye-witness to one of the decisive battles of Indian history, is not without significance.

(3) Another form of duty or function which could be assigned to an envoy was to negotiate a settlement or to conclude a treaty recognising the authority of the rival potentate.

A graphic account of how an envoy was received and treated in the court of another foreign prince, is to be had from the siege of Ranthambhor by Akbar (1568 A D). Todd, in his *Annals and Antiquities of Rajasthan*, describes this incident as follows:—

> "Ranthambhor was an early object of Akbar's attention, who besieged it in person He had been some time before its impregnable walls without the hope of its surrender, when Bhagwandas of Amber and his son, the more celebrated Raja Man, who had not only tendered their allegiance to Akbar, but allied themselves to him by marriage, determined to use their influence to make Surjan Hara faithless to his pledge, 'to hold the castle as a fief of Chittor.' That courtesy, which is never laid aside amongst belligerent Rajputs, obtained Raja Man access to the castle, and the emperor accompanied him in the guise of a mace-bearer. While conversing, an uncle of the Rao recognized the emperor, and with that sudden impulse which arises from respect, took the mace from his hand and placed Akbar on the

cushion of the governor of the castle. Akbar's presence of mind did not forsake him, and he said, 'Well, Rao Surjan, what is to be done?' which was replied to by Raja Man, 'Leave the Rana, give up Ranthambhor, and become the servant of the king, with high honours and office.' The proffered bribe was indeed magnificent; the government of fifty-two districts, whose revenues were to be appropriated without enquiry, on furnishing the customary contingent, and liberty to name any other terms, which should be solemnly guaranteed by the king.

"A treaty was drawn upon the spot, and mediated by the prince of Amber, which presents a good picture of Hindu feeling."[36]

The details of the Treaty are given later when dealing with the subject of mediaeval treaties, but what is important here is the conduct of negotiations leading to the treaty and the immunity which the Moghul emissaries, including the Emperor, enjoyed in the court of Ranthambhor, even though the personality of Akbar was detected and he could be quite easily taken a prisoner or even slain.

Again, in *Tabakat-i-Akbari*, it is stated that the Jam of Kathiawar sent his *vakils* to Khan-Khanan, the famous General of Akbar, "to represent that he was friendly to the Imperial Government and that he may have taken money from Muzaffar, (enemy of Emperor Akbar) but had not joined him, and that he was then ready to conduct the army to the place where Muzaffar was staying."[37] It appears that the *vakils* sent by the Jam were kept by Khan-Khanan in his court during his war with Muzaffar. *Tabakat-i-Akbari* recites further that "while Khan-Khanan was thus engaged in the mountains of Barda, it became known that the Jam was not acting honestly. His *vakils* were dismissed and sent back to him. The Jam prepared to oppose us, and collected an army of twenty thousand horse and innumer-

36. Todd, *Annals and Antiquities of Rajasthan*, Vol. III, pp. 1481-82.
37. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. V, p. 438.

able infantry. When Khan-Khanan came to within seven *kos* of him, he sent an envoy to make his apologies, and he also sent his son with three large elephants and eighteen Arab horses to Khan-Khanan, expressing his earnest desire to enter into a treaty, and to act in a friendly way."[38] This incident brings out an important feature of state practice relating to dismissal of a *vakil* or envoy if hostilities were to be declared against the state represented by the *vakil* or the envoy.

(5) An ambassador or envoy was also sent as a token of friendship without any specific motive. It is mentioned in *Tabakat-i-Akbari* that "when Humayun died, and was succeeded by Akbar, the Shah (of Persia) was desirous of keeping up friendly relations. He accordingly sent his nephew, Saiyid Beg, son of Masum Beg, to whom he gave the title Ummu-ughli (uncle's son), as his ambassador, with costly presents. When Saiyid Beg approached Agra, many Khans and great men were sent forth by the Emperor of Delhi to meet him, and to bring him into the city with suitable honours. The sum of seven lacs of *tankas* was appropriated to him. He remained at Agra for two months, and having received a horse and a robe he took his departure carrying with him presents from Hindustan."[39] Even in such cases the envoy had to take leave of the Head of the state to whom he had been sent and, till he was permitted to depart, he enjoyed the hospitality of the foreign state to which he was deputed.

Another example we have of envoys being exchanged professing friendship dates back to the reign of Jehangir. Shah Abbas Khan of Persia was known to send ambassadors from time to time, as a token of friendship, to the Court of the Moghul Emperors. One of these arrived at Ajmer in 1616 A.D. when Sir Thomas Roe was at the imperial Moghul Court. At that time Sir Thomas Roe was the accredited ambassador of King James I of England and he lost no time in recognising the difference between the reception given to the Persian ambassador

38. *Ibid*, p. 439.

39. Elliot and Dowson, *History of India as Told by Its Own Historians*, Vol. V, p. 276.

and the treatment meted out to himself. Sir Thomas Roe recorded that he himself was unable to offer such magnificent gifts as had been sent by the Shah of Persia. Jehangir's estimate of the relative importance of the two envoys appears from the elaborate account given in the memoirs of Abbas Khan, where the English ambassador is not even mentioned. It is on record that a Moghul representative was sent to the Court of the King of Persia in return and he too was given a gracious welcome However, this exchange of courtesies as a token of friendship turned out to be a mere cloak to hide the designs of aggression of Shah Abbas, the King of Persia. It is known that after the fourth embassy had arrived towards the end of 1620 A.D., Kandahar was attacked, and fell, since the main forces of the empire were employed fighting in the East.[40]

(6) Lastly, we have examples of envoys being sent by kings during marches to obtain the assistance of neighbouring states who were otherwise neutral It is mentioned in *Tabakat-i-Akbari* that "when winter came on, the Chaghatai people had no place of shelter, so the Emperor sent a person into Kandahar to Bidagh Khan, to represent the need which they had of some protection against the rigours of the winter. But he, in his inhumanity, did not make that reply which the emergency required."[41]

The several illustrations given above indicate that envoys were used not only for making alliances between Muslim states *inter se*, as for example Emperor Babur and the Shah of Persia, but also used by the non-Islamic states of *Aryavarta*, whether seeking alliance amongst themselves or with Islamic states. That the machinery of envoys and emissaries was used by states of *Aryavarta* amongst themselves is brought out by Taj-ul-Ma'asir in a passage which is translated as follows: "Many independent princes assembled to fight against Kutb-ud-Din at Ajmer (1197 A.D.). The Raja of Nagoor and many other Hindu Rajas having gathered together sent emissaries to the Rae of Nahar-

40. *The Cambridge History of India,* Vol. IV, p. 170.
41. Elliot and Dowson, *History of India as Told by Its Own Historians,* Vol. V, p. 221.

walah asking him to aid them in attacking the Musalmans who were but few in numbers."[42]

Immunity of Envoy in Transit

Though the immunity of the envoy or emissary in the court of the state to which he was sent was well recognised in mediaeval India, there is no precise state practice which could be quoted in regard to the immunity of the envoy while transiting the territories of other states. On the other hand, one incident recorded by historians of the period reveals that an envoy on his journey to the state of his destination could be stopped and deprived of the message he may be carrying, by the sovereign of one of the states *en route*. Farishta records that in 1525 A.D, Mahmud Shah of Gujarat (a minor), as advised by his Minister Imad-ul-Mulk, had sent two envoys with messages for help as the Sultan's position in Gujarat was extremely precarious. One agent was accordingly despatched to Rana Sanga of Mewar promising a large sum of money in lieu of assistance. Another emissary was despatched to Emperor Babur requesting him to send a force down the Sindhu to help Imad-ul-Mulk. Farishta states that "the communication (sent by Imad-ul-Mulk to Babur) never reached its destiny having been intercepted by the ruler of Dungarpur."[43] Thus Rawal Udai Singh, the ruler of Dungarpur, who belonged to the same family and clan of Rajputs as the Rana of Mewar, in sympathy with the Rajput cause, detained the envoy of the Sultan of Gujarat and, according to *Mirat-i-Sikandari*, snatched away from his hands the message meant for Babur. The envoy was prevented from reaching Babur or his home town till the danger of an alliance of Babur with the Sultan of Gujarat was over. In the message which was intercepted, the Sultan of Gujarat had promised one crore of silver rupees and the port of Diu for obtaining the assistance of Emperor Babur.[44] It appears, therefore, that the envoy transiting states on his way to another state had to be cautious not to be detained in hostile regions.

42. *Bibliotheca Indica*: The Tabakat I Nasiri, p 520.
43. Majumdar, *The Delhi Sultanate*, p. 345.
44. See *Bailey's History of Gujarat*, p. 319, and *Farishta*, translated by Briggs, Vol. IV, p. 102.

Again, the south Indian state practice is full of incidents relating to envoys and emissaries deputed *inter se* among states of south India as well as to Ceylon.

State Practice in South India and Ceylon

The immunity of the envoy from arrest or attack when on official state errands was well known, but it appears that in a couple of instances, it was badly violated. As the Cola kings were constantly coming in contact with the independent kingdom of Ceylon, there were frequent visits of envoys on either side. The incident reported by Mahavamsa of an occurrence which took place in 1088 A.D. involving the immunity of an envoy, indicates what could happen when relations between states were strained. The account given by Mahayamsa and reproduced by Dr. Nilakanta Sastri in his valuable treatise on the Colas is given below:—

> " 'Envoys sent by the Kannata Monarch and by the Cola King came hither with rich presents. They sought out the Monarch. He was greatly pleased thereat and after rendering both embassies what was their due, he sent at first with the Kannata messenger his own envoys to Kannata, with choice gifts. But the Colas maimed the noses and ears of the Sinhala messengers horribly when they entered their country. Thus disfigured they returned hither and told the King everything that had been done to them by the Cola King. In flaming fury Vijayabahu in the midst of all his courtiers had the Damila envoys summoned and gave them the following message for the Cola King. "Beyond ear-shot, on a lonely island in the midst of the ocean shall a trial of the strength of our arms take place in single combat, or, after arming the whole forces of thy kingdom and of mine, a battle shall be fought at a spot to be determined by thee; exactly in the manner I have said it shall ye report to your master." After these words he dismissed the envoys clad in women's apparel in haste to the Cola King, then betook himself with his

army to Anuradhapura. To the seaports Mattikavata-tittha and Mahatittha he sent two generals to betake themselves to the Cola kingdom and began the war. While the generals were procuring ships and provisions in order to send the troops to the Cola kingdom, then, in the thirtieth year (of the king's reign), the division of the troops called Velakkara revolted as they did not want to go thither. They slew the two generals and like running elephants in their unbridledness, they plundered the country round Pulatthinagara They captured the younger sister of the King with her three sons and burned down with violence the King's palace The King left the town and betook himself in haste to Dakkinadesa and having hidden all his valuable possessions on the Vatagiri rock, he advanced together with the Uparaja Virabahu, of lion-like courage, and surrounded by a great force, to Pulatthinagara where after a sharp fight he shortly put the assembled troops to flight Placing them around the pyre on which were laid the remains of the murdered generals, he had the recreant leaders of the troops, their hands bound fast to their backs, chained to a stake and burnt in the midst of the flames blazing up around them The Ruler having (thus) executed there the ring-leaders of the rebels, freed the soil of Lanka everywhere from the briers (of the rebels)' "[45]

Again, during the reign of Rajendra the Great, we have an example of a trade mission sent to India by the Chinese In response, the Cola kings also sent envoys and embassies to China. The history of the Sung dynasty brings out the fact that the first mission to China reached that country in 1015 A.D The following account indicates how trade and commerce fostered inter-state intercourse which was carried out through the institution of envoys, missions, *etc.*

"The Cola Empire of South India was in constant com-

45. *The Colas,* by K A Nilakanta Sastri, University of Madras 1955, pp 314 315

munication with the islands of the Archipelago and with China during the middle ages. As in ancient times, this trade was part of a flourishing maritime commerce between the countries of the Western world and China, in which Arabs, Indians and the people of the Malay peninsula and Archipelago acted as intermediaries. At the end of the tenth century A.D. the Chinese Government awoke to the value of the foreign trade which was just then reviving after a long interruption owing to the troubles which broke out in China in the latter part of ninth century, and with the object of increasing this trade, a mission was sent abroad by the Emperor with credentials under the imperial seal and provisions of gold and piece-goods to induce the foreign traders of the South Sea and those who went to foreign lands beyond the sea to trade to come to China. It must have been in response to such friendly invitations that the kings of Sri Vijaya sent the embassies of the years 1003 and 1008 to which we have already made reference. The annals of the Sung dynasty record that the first mission to China from Chu-Lien (Cola) reached that country in A D. 1015 and state that the king of their country was Lo-ts'a-lo-ts'a (Rajaraja). Another embassy from Shi-lo-lo-cha Yin-to-lo-chu-lo (Sri Raja Indra Cola) reached China in 1033, and a third in 1077 from Kulottunga-Cola-Deva. The commercial intercourse between southern India and China was, therefore, continuous and extensive."[46]

State Practice in regard to Envoys and Ambassadors of Early European Settlements in India

The Portuguese

The Zamorin had frequent dealings with the Portuguese in the early 16th century. The King of Portugal sent a large fleet of 13 vessels under Pedro Alvarez Cabral in 1500 A.D. The Zamorin welcomed Cabral and signed a treaty of friendship which

46. *The Colas* by K.A. Nilakanta Sastri, University of Madras, 1955, p. 219.

enabled the Portuguese to establish a factory at Calicut. The Portuguese freely conspired with the Rajas of Cannanore and Quilon who were the feudatories of the Zamorin desirous of obtaining their independence with the help of the foreign power. It is on record that on his return journey Cabral visited Cannanore and received on board an ambassador from the Raja to the King of Portugal, sent with presents and the offer of free trade in his kingdom.

It is also on record how Vasco da Gama treated the ambassador of the Zamorin in complete violation of the well-established state practice of Europe in regard to the immunity of envoys. The Brahmana envoy of the Zamorin had his hands and ears cut off while his limbs were severed and after being carefully packed, were despatched off to the Zamorin with a letter telling the King "to make curry out of them and eat it."[47] This abrogation of recognised state practice not only of Europe but also of Asia has perhaps no parallel in the history of the civilized world.

Sir Thomas Roe as an Ambassador at the Court of the Great Moghul

No account of embassies or envoys in mediaeval India would be complete without a mention of the embassy of Sir Thomas Roe whose choice as formally accredited ambassador to the Moghul Court was approved by King James II of England. The Ambassador's commission was duly sealed with the great Seal of England and Sir Thomas Roe was entrusted with the supreme task of negotiating a commercial treaty or a trade agreement with India. As this embassy constitutes a landmark in the development of international law concepts in Indian history and is a distinct chapter by itself, the relevant details of this embassy are mentioned below.

Sir Thomas Roe arrived at Surat on 25 September, 1615. The diplomatic practice in regard to immunity from customs is

47. Danvers, *The Portuguese in India*, p. 85.
See also, K. V. Krishna Ayyar, *The Zamorins of Calicut.*

brought out by Tavernier in his *Travels in India.* Disregarding his rank of ambassador, the customs officials attempted to make a thorough search of his luggage. The ambassador refusing to submit to this indignity, stated, as Tavernier writes in his diary, that "in Europe and most parts of Asia all ambassadors and their traynes were so far privileged as not to be subject to common and barbarous usage."[48] It appears that the order of search was revoked by the King and the ambassador was ultimately allowed his privileges. It is significant that the ambassador, who was himself a lawyer, had remarked that envoys in most parts of Asia enjoyed privileges. It is further borne out by Vattel in *Droit Des Gens* that ambassadors were highly respected in China as well as in other Asian and Arabian countries. There is no doubt that Sir Thomas Roe was not treated on a footing of equality with other ambassadors such as those from Persia, since England was a very distant country and the status and prestige of its sovereign was then not known to the Moghuls. Sir Thomas Roe was asked to observe the oriental practice of touching the ground with the forehead, which he refused to comply with. He insisted on following the custom observed in European countries and his request was allowed, with the result that he bowed to the Emperor in a manner which was befitting the dignity of an English ambassador. Sir Thomas Roe explained at length to the Moghul Emperor his mission of concluding a commercial treaty. However, in this respect he was referred to Asaf Khan who was in charge of all business relating to foreigners. The draft treaty which was presented by Roe to Asaf Khan was carefully examined by the latter and returned with several queries. The ambassador's note in his diary is of considerable interest in so far as the state practice in regard to negotiating a treaty is concerned. Sir Thomas Roe writes as follows:—

> "I received my articles back from Asaf Khan, who took now at last many exceptions and margined them with his pen...saying it was sufficient for me to receive a *firman* from the prince who was lord of Surat and as for licence to trade at any other port of Bengala or

48. Tavernier, *Travels in India.*

> Syndu it should never be granted; but in conclusion pretended the length and form to such as would offend the king. Some articles he consented to, and to them being reduced to the form of *firman* he would procure it sealed."[49]

The fact that the Moghuls reduced the terms of a commercial treaty to the basis of a Moghul *firman* indicates that the Moghuls refused to treat on an equal footing a country whose antecedents and whereabouts were hardly known. Sir Thomas Roe accordingly obtained a *firman* from Prince Khurrum, the heir-apparent to the throne, who later became Emperor Shah Jahan. The *firman* was a grant or a royal decree and in this case it authorised the English to trade at Surat. The Company was permitted to import goods provided it paid a customs duty of 3½ per cent.

A noteworthy feature of Sir Thomas Roe's embassy was that it was long enough to constitute, as it were, a regular embassy, a concept then unknown in mediaeval India. However, even Roe's embassy was for an *ad hoc* purpose and no more, which is significant. He was commissioned to negotiate a commercial treaty with the Moghul Emperor and was thus not an ambassador at large, as we know the institution today.

Conclusion

There would appear to be a well-established customary practice in mediaeval India in regard to the receiving of envoys, their conduct during their mission and their departure. The customary rules on this subject, which may be said to exist in a fairly well-formulated manner, may be briefly summarised as follows:

(i) The institution of envoys or emissaries obtained both in time of peace and war and, on all occasions, complete immunity from molestation was accepted as a rule of law. The violations of the rule were recognised as such and looked down upon.

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49. *The Embassy of Sir Thomas Roe*, 2nd edition (Hakluyt Society), p. 155.

(ii) The emissary always brought a message whether written or verbal. If there was a verbal message, he took with him such officials and paraphernalia as might lead the prince of the foreign state to have confidence in the veracity of the envoy.

(iii) Envoys brought presents or gifts as a rule if they were seeking an alliance, military assistance or friendship.

(iv) On arrival, the envoy or emissary was brought before the royal presence and at that stage he was usually unarmed. The first act of his mission was to meet the foreign prince and the last act before he left was to seek official permission to depart from the territories of the foreign prince.

(v) If an envoy suspected treachery, he often left without seeking official permission. This was not regarded as an act of hostility but was certainly looked upon with great suspicion and was indicative of strained relations.

(vi) If an envoy was dismissed by the foreign prince without the grant of customary presents, it did amount to an act of hostility and was usually followed by an army chasing the prince whose *vakil* was asked to depart to his state. Thus Emperor Shah Jahan, who marched down south in 1631 A.D. to crush the rebel Khan Jahan, sent an envoy to the court of the kingdom of Golconda, who returned with presents indicating peaceful relations. But the second envoy sent toward the end of 1631 was detained in Golconda and finally dismissed without the usual presents when news was received that Asaf Khan, who had led an expedition against Bijapur, had failed and returned to the North.[50]

(vii) There is also an example of an envoy being put to death since he had proved faithless to his mas-

50. *Cambridge History of India,* Vol. IV, p. 197.

ter. When Alauddin Khilji laid siege to the fortress of Ranthambhor in 1301 A.D., Hamirdeo, the ruler, had sent his minister Ranamalla to Allauddin to negotiate peace. However, Ranamalla along with his followers, absconded and deserted his master. As there was no hope for the incumbents of the fort, women performed *johar* and Hamirdeo with his Rajputs died fighting while the fort capitulated on July 11, 1301 A.D. Allauddin put to death Ranamalla and other Rajputs who had joined him and had proved faithless to their master."

TREATIES IN MEDIAEVAL INDIA

Sanctity of Treaties

The function of treaties in the middle ages, as today, has been to make precise and certain the conduct of inter-state relations in any particular sphere and much more so if the intercourse between two or more states was to be regulated over a long period. The utility of a treaty has, therefore, always depended upon its meticulous observance Thus the first essential fact to ascertain is whether in the middle ages there was any sanctity attached to treaties by the laws of *Aryavarta* as well as according to the *Quranic* precepts.

In regard to the sanctity of the plighted word, even Kautilya has decreed that there could be no salvation for the individual who broke promises Except for stratagems and ruses of war, the sanctity of the word pledged was well recognised by non-Islamic Aryan states such as Shivaji's Mahratta Empire as late as the 17th century A.D.

In regard to the Islamic states, the *Quran* has been equally emphatic in this respect for it recites:

> "...fulfil the covenant of Allah when you have made a covenant, and do not break oaths after making them . be not like her who unravels her yarn, disintegrating it into pieces after she has spun it strongly."
>
> *Quran*, XVI, 93-94.

It would thus *prima facie* appear that treaties signed between Islamic states *inter se* would be binding as they would represent the plighted word of a believer to another believer.

The position in regard to a treaty negotiated by an Islamic state with a non-Islamic political unit would be governed, in strict Islamic theory, by another verse of the *Quran* which reads as follows:

> "How can there be for the polytheists a treaty with Allah and with His Apostle, save those with whom ye have made a treaty, at the Sacred Mosque! So, as long as they act uprightly by you, do ye act uprightly by them; verily, Allah loves those who fear."
>
> *Quran*, IX, 7.

A treaty between an Islamic state and a state of *Aryavarta* would, therefore, appear to be binding on the former so long as the latter "acted uprightly". Khadduri has attempted to elaborate the significance of the words "acted uprightly" and has observed that although the normal relationship between Islam and non-Muslim communities was a state of hostility, treaties with the latter were not inconsistent with Islam's ultimate objective if they were concluded "for purposes of expediency or because Islam had suffered a setback."[51] In this explanation, Khadduri is supported by Abu Yusuf, Shafi and other eminent writers. There is also a precedent from Asian history cited to support the contention that peace treaties could be concluded between Islamic and non-Islamic states. The Prophet himself is known to have concluded a treaty with the Makkans, which is known as the Hudaybiya Treaty. Again, the Prophet is reported to have said: "The Byzantines will be making a secure peace with you (Muslims)" Thus, not only in theory but also in practice, the concluding of a peace treaty with a non-Islamic authority is justified and is fully supported by incidents from mediaeval Indian history as well. In fact, both in theory and practice, treaties were accepted as binding in the middle ages irrespective of the religious faith of the parties concerned. The importance of the oath behind the treaty supplied the sanction for

51. Khadduri, *War and Peace in the Law of Islam* (1955), p. 202.

respecting it and the *Quranic* verses quoted above may be regarded as furnishing in mediaeval India, as well as in Asian history, the modern doctrine of *pacta sunt servanda.*

Again, the respect for the plighted word was not merely a doctrine enshrined in the *Quran* but was also adhered to in state practice. It has been shown earlier how Emperor Babur, pledged to support the Shia faith in Samarkand in accordance with his treaty with the Shah of Persia, stuck to his word as best as he could, despite his personal disgust with the faith he was pledged to propagate. It is not that every mediaeval treaty was invariably respected since examples abound of the existence of treaty breakers, then as even today. What is important is the fact that the pact-breaker was denounced on the basis that the parties were fully alive to the sanctity of the pledged word. Thus Babur has repeatedly mentioned in his memoirs that he could not repudiate his word given on oath, howsoever galling the position may have become. Apart from this episode of Central Asian history of the 16th century A D., we have the valuable correspondence of Emperor Humayun with Sultan Bahadur Shah of Gujarat. Both were the Heads of two fully sovereign states of mediaeval India of the 16th century A D. The relevant extract from Humayun's letter as recorded in *Mirat-e-Sikandari* is reproduced below:—

> "It never occurred to me that you would after that transgress the limits of the meanings of (the *Quranic* verse) 'Oh ye true believers perform your promises,' and set at naught the behest of the Prophet (on whom be peace): 'Verily the fulfilment of a promise is the best form of faith."[52]

Nature of Treaties

A treaty has been described as a form of *aqd* which literally means a tie or conjunction. A treaty, therefore, in the middle ages, represented an agreement binding on the parties concerned and the violation of the same gave, to the other party, a right to redress its grievance by resort to force. It could also

52. *Mirat-e-Sikandari* (Translated by F. L. Faridi), pp. 181-182.

be stated that consent lay at the root of the mediaeval treaty as much as it furnishes the basis of international conventions today. The signing of treaties or reducing them to writing did not constitute essential factors since the *Quran* had urged the Muslims "not to break oaths after making them" (*Quran*, XVI, 93). Moreover, if the non-Islamic authority did not break solemn treaties, the Islamic state was required to "fulfil the obligations of the agreement to the end of its term" (*Quran*, IX, 4). In theory, therefore, an agreement though verbal, if based on oath, was as binding as a solemn treaty. A treaty was thus more than a mere contract as it was obtained on oath and sometimes even concrete evidence of this was furnished in the shape of the seal of the Kazi, which would almost amount to swearing on the *Quran*. Thus a treaty in the middle ages had all the sanctity which is attached to it in modern times, if not more. Besides it bound only the parties to it and none else.

Kinds of Treaties and the Mediaeval State Practice

The modern classification of treaties into law-making treaties or *traites lois*, and treaties that are contractual by nature or *traites contra*, was perhaps unknown in the middle ages owing to the absence, generally, of the law-making type of treaty. Even if we had an example of a treaty attempting to regulate a point of law, such as the one negotiated between the Bahmani and the Vijayanagar Kingdoms in the 14th century A.D. on the treatment of prisoners of war, of which more will be said later, its basic feature would be to bind only the two parties to it and none else. It could not, therefore, be said to lay down universal international law on the subject. There is not one instance available of a multilateral convention signed with a view to regulating interstate conduct generally, like the Hague Conventions of 1899 and 1907.

In accordance with their objects and functions, mediaeval treaties could perhaps be classified into the following categories:—

A. *Treaties Enforceable in Peace*

(i) Performance treaties, *i.e.*, those requiring each party to perform its part of the obligation embodi-

ed in the treaty for which there may be consideration forthcoming in the form of land or money.

(ii) Treaties effecting exchange of territory.

(iii) Treaties effecting a political settlement, *i.e.*, prescribing the exact nature of relationship of one state to another.

(iv) Treaties in the form of (a) non-aggression pacts, and (b) military alliances.

(v) Treaty or agreement signed between two states granting safe conduct to the citizens of one through the territories of the other.

(vi) Treaties (of peace) concluded after war involving subjugation of one state to another, and the practice of holding hostages as a sanction for enforcing the agreement.

(vii) Treaties of trade and commerce signed by the Moghul Emperors with Western Powers.

B. *Treaties Enforceable in War.*

There is only one solitary example of this type of treaty in mediaeval India which relates to prisoners of war and which, as stated already, was signed by two South Indian states, in the 14th century A.D.

Some of the treaties illustrative of the principles of interstate law relating to parties to a treaty as well as the method of negotiating and celebrating them are mentioned below.

A. *Treaties Enforceable in Peace*

(i) *Performance Treaties*

The following examples of *performance treaties* indicate that usually, but not necessarily, the parties were sovereign independent states.

(a) Treaty between Alam Khan Lodi and Emperor Babur (1524-25 A.D.)

Babur concluded a treaty with Alam Khan agreeing to seat the latter on the throne of Delhi on condition "that he himself should receive Lahore and the country west of it in full suzerainty. Alam Khan was then sent to Hindustan, armed with orders to Babur's generals in the Panjab. The King of Kabul himself (Babur) was unable to leave, as he had to go to Balkh, which the Uzbegs were besieging. Once in Hindustan, however, Alam Khan lost his head, and was artfully seduced by Daulat Khan, who feigned loyalty and sympathy. In consequence, Alam Khan threw over the alliance with Babur, brushed aside the remonstrances of Babur's officers, and ceded the Panjab to Daulat. Then in conjunction with his new ally, he marched on Delhi, only to be disgracefully routed by Ibrahim in person. His army broke up, and he himself fled in terror."[53] The end was indeed befitting the conduct of the lord who broke his word.

(b) Treaty between Daulat Khan and Alam Khan (1524-25 A.D.)

Daulat Khan was the Viceroy of the Panjab under Sultan Ibrahim Lodi of Delhi but had renounced his allegiance to the throne and sent his son to Babur at Kabul, offering fealty and inviting his help against the King of Delhi. As a result of Babur's intervention the city of Lahore was captured but Babur would give only Sultanpur to Daulat Khan, which was resented by the latter. Daulat Khan, therefore, wrote to Alauddin or Alam Khan that he wanted the latter to become the Emperor of Delhi and, to inspire confidence, sent his assurance which "were accompanied by a deed of allegiance, under the seal of his Kazis and Chiefs."[54]

In respect of these two treaties both the parties were not fully sovereign. If Babur was an independent sovereign prince of Central Asia, Daulat Khan and Alam Khan could not be said to be Heads of sovereign states. Alam Khan was the son of Bahlol Lodi and hence a prince of the royal blood but not

53. L.F. Rushbrook Williams, *An Empire Builder of the Sixteenth Century*, 1918, p. 122.

54. *Memoirs of Zahiruddin Muhammad Babur* (translated by J. Leyden, William, Erskine and Sir Lucas King), 1921, Vol. II, p. 153.

the head of a state. Daulat Khan was, as stated earlier, a Viceroy of Ibrahim Lodi, Sultan of Delhi, but had shaken off his allegiance to Delhi and could be regarded as a chieftain with territorial possessions. However, both Alam Khan and Daulat Khan were aspiring for the imperial throne and concluded treaties with Babur who was to assist them for territorial gains which were promised to the Central Asian prince in lieu of such support. The treaties were regarded as valid despite the limitations in regard to parties who, with the exception of Babur, were not sovereign in the legal sense of the term.

(ii) *Treaties concerning exchange of territories*

Treaties entered into with the object of effecting exchange of territories are many, but very few as between Islamic states and non-Islamic political units of Aryavarta. The one mentioned by Babur in his memoirs is revealing as it brings out the technique of negotiation and the treatment accorded to envoys along with the important fact that agreements negotiated by them had to be ratified. The description given by Babur himself in regard to the proposal made in 1528 A.D., by the successors of Rana Sanga of Mewar, for the exchange of the fort of Ranthambhor for cash or certain parganas or territories, is reproduced below:—

> "Next day, being Tuesday, the 14th, messengers arrived from Bikramajit, the second son of Rana Sanka, who with his mother Padmawati was in Ranthambhor. Before leaving for Gwalior an emissary had come from a Hindu named Asuk, who was high in Bikramajit's confidence, with offers of a treaty involving the sale of Ranthambhor for an annuity of Rs. 70 lacs. The bargain was concluded and it was settled that on delivery of the fort of Ranthambhor, he (the Rana) should have parganas assigned him equal to what he had asked. After making this arrangement, I sent back his messengers.
>
> "When I went to survey Gwalior, I made an appointment to meet his (Rana's) men in Gwalior. They were se-

veral days later than the appointed time. Asuk, the Hindu, had himself been with Padmawati, Bikramajit's mother, and had explained to the mother and the son everything that had passed. *They approved of Asuk's proceedings* and agreed to make the necessary arrangement by way of submission of the fort. The messengers who came to see me again asked for Biana in exchange for Ranthambhor. I diverted them from their demand for Biana and Shamsabad was fixed on as the equivalent for Ranthambhor. The same day I bestowed dresses of honour on the Rana's people (emissaries) and dismissed them after making an appointment for a meeting at Biana in nine days"[55]

(iii) *Treaties settling Political Relations*

Among treaties making for political settlement, the most typical of the period dates back to Akbar's reign. The Emperor, in pursuance of his policy of befriending the Rajput chieftains, wanted to have a treaty with the Ruler of Bundi who was at that time in possession of the great fort of Ranthambhor, being the head of the Hara clan of Rajputs. The circumstances leading to this treaty have already been described earlier and the text of the treaty signed in 1569 A.D. is reproduced below:—

"(1) That the Chief of Bundi should be exempted from that custom, degrading to a Rajput, of sending a dola to the royal harem.

(2) Exemption from the jizya, or poll-tax.

(3) That the Chief of Bundi should not be compelled to cross the Attock.

(4) That the vassals of Bundi should be exempted from the obligation of sending their wives or female relatives 'to hold a stall in the Mina Bazar' at the palace, at the festival of Nauroza.

55. *Memoirs of Zahiruddin Muhammad Babur* (translated by J. Leyden, William, Erskine and Sir Lucas King), 1921, Vol. II, p. 342.

(5) That they should have the privilege of entering the Diwan-i-Aam, or 'hall of audience', completely armed.

(6) That their sacred edifices should be respected.

(7) That they should never be placed under the command of another *Hindu* Raja or leader.

(8) That their horses should not be branded with the imperial *dagh.*

(9) That they should be allowed to bear their nakkaras, or 'kettledrums' in the streets of the capital as far as the Lal Darwaza or Red Gate; and that they should not be commanded to make the 'prostration' on entering in front of the Presence.

(10) That Bundi should be to the Haras what Delhi was to the King, who should guarantee them from any change of capital.

"In addition to these articles, which the King swore to maintain, he assigned the Rao a residence at the sacred city of Kasi, possessing the privilege so dear to the Rajput, the right of sanctuary, which is maintained to this day."[56]

The parties to the treaty were in one sense co-equal in status, being sovereign, in that neither the Rao of Bundi nor Akbar were subordinate to any authority, being Heads of their respective states. The treaty also does not render one state subordinate to the other but determines the political relationship of the head of the Hara clan, the Rao of Bundi with imperial Delhi.

(iv) *Treaties in the form of* (a) *non-aggression pacts and* (b) *Military Alliances.*

Though there are several treaties dealing with military alliances, there are very few on the subject of non-aggression pacts

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56 *Annals and Antiquities of Rajasthan,* by Lieut Col James Tod, Vol. III, p. 1482.

(a) In regard to the latter, there is a typical agreement negotiated by the Solankis of Gujarat with the Yadavs of Deogir. The Solankis had their kingdom in Gujarat and the Yadavs were the rulers of the independent kingdom of Deogir. Thus both were sovereign states in their own right and they signed a treaty which is known as *Yamalpatra.* There are various names given to treaties in Sanskrit such as *Sandhipatra,* and it appears that *Yamalpatra* is another name given to the document which represents an agreement. The *Yamalpatra* signed in about 1231 A.D., runs as follows:—

> "On this day the 15th Sudi of Vaisakha, in the year Samvat 1288, in the camp of victory, (a treaty) between the Maharajadhiraja-Srimat-Simhana and the Mahamandalesvara-Ranka Sri Lavanaprasada. Simhana whose patrimony is paramount sovereignty and the Mahamandalesvara Sri Lavanaprasada should according to former usage confine themselves, each to his own country; neither should invade the country of the other. If a powerful enemy attacks either of them, they should jointly oppose him If from the country of either any noble fled into the territory of the other taking with him anything of value, he should not be given asylum and all valuables removed by the refugee should be restored."[57]

(b) In regard to treaties signed to organise military alliances, the best known is perhaps the one organised by Raja Anandpal in 1008 A D. against Sultan Mahmud of Ghazni. Raja Anandpal of Punjab, who owed allegiance to none, had organised a grand alliance comprising the rulers of Aryavarta who were also sovereign in their own right. Thus the Rajas of Ujjain, Gwalior, Kalinjar, Kannauj, Delhi and Ajmer sent their troops to the assistance of Raja Anandpal in order to meet the invasion of Sultan Mahmud.

Another example of an offensive military alliance against a common enemy can be had in the treaty which was negotiated between the Sultans of Malwa and Gujarat in 1456 A.D.

57. A. K. Majumdar, *The Chalukyas of Gujarat,* p 152.

against the kingdom of Mewar. Sultan Mahmud Khilji of Malwa who bore an old grudge against the state of Mewar, signed at Champaner, in 1456 A.D., a treaty with the Sultan of Gujarat. This offensive military alliance was further supported by the Rathore Raja Jodha of Marwar. The object of the treaty as described by Muslim historians was as follows:—

> "To direct their efforts against Rana Kumbha....Mahmud should assail him on one side and Qutb-ud-din on the other...they would utterly destroy him...divide his country between them...all the towns lying contiguous to Gujarat were to be attached to the kingdom of Qutb-ud-din, while the districts of Mewar and Aheerwara should be retained by the Malwa forces."[58]

Instances of military alliances can be multiplied, but the above two serve to illustrate that treaties were often concluded to cement military alliances, in the sense that they would not be violated, when once reduced to writing and brought on oath.

(v) *Treaties concerning safe conduct for citizens in the territories of alien States*

There is an inscription of V.S. 1393 which refers to Prithviraja Chahamana's conflict with Bhima II, the Chalukya King of Gujarat. It refers to a unique type of treaty in which the safety of pilgrim caravans is assured by Bhima, the King of Gujarat. The details of the treaty are given below. In V.S. 1244, or 1187 A.D., the pilgrim caravan from Ajmer received the permission of Jaggadeva Pratihara, Bhima's Chief Minister, to pass through the kingdom of Gujarat. "When Dandanayaka Abhayadeva of Asvala wanted to punish the Kharatara sangha, he wrote to Jaggadeva Pratihara: 'In our territory we have at present many extremely rich people from Sapadalaksha. If I receive your permission, I shall provide fodder for our state horses'. Jaggadeva Pratihara was extremely angry and wrote back: 'I have with great difficulty concluded just now a treaty with Prithviraja. If you interfere with the people from Sapada-

58. Bayley, *History of Gujarat* (translation of *Mirat-e-Sikandari*), p. 150.

laksha, I shall have you sewn in the belly of an ass'. This brought the Dandanayaka to his senses and he permitted the sangha to proceed to Anahilapataka."[59]

(vi) *Treaties of peace after war involving subjugation of one State to another and the practice of holding hostages as a sanction for enforcing the agreement*

The entire history of the middle ages abounds with examples of treaties of peace concluded after a war in which the victorious sovereign after dictating terms to the defeated state demanded hostages in addition. For example, in 1001 A.D., Sultan Mahmud defeated Raja Jaipal and after plundering Und, permitted Raja Jaipal to ransom himself for a large sum of money and 159 elephants. However, the ransom was not at once forthcoming and Jaipal was obliged to leave hostages pending its payment. It is reported that Jaipal's son Anandpal made good the deficiency and the hostages were relcased before Mahmud returned to Ghazni.

Another treaty of the same type signed much later, in 1636 A.D., by Emperor Shahjahan with the Kingdom of Golconda, compelled the latter to have the name of Shahjahan inserted in the Friday prayers (Khutba) and to abolish Shia practices. The terms imposed by the Emperor of Delhi on the Kingdom of Golconda included the use of Emperor's name on the Golconda coins, payment of an annual tribute of 200,000 huns and promise of help if the Imperial forces were attacked by Bijapur. "Among the presents taken by the Emperor with the written treaty (May 1636) were coins of Moghul type bearing his name for the first time. His return presents included his portrait and a gold tablet on which the details of the treaty were engraved."[60]

(vii) *Agreements of Trade and Commerce in the shape of Imperial Firmans*

No foreign merchant could settle in any part of the Moghul Empire as a matter of right and indulge in commercial

59. A.K. Majumdar, *Chalukyas of Gujarat*, p. 141.
60. *The Cambriage History of India*, Vol. IV, p. 197.

activity.[61] It was only after obtaining the *firman* of the Moghul Emperors that a foreigner could trade in the country. Thus Captain Hawkins, who was the leader of the first voyage to the East and the first to arrive in Surat in 1607 A.D., had to approach the court of the Emperor Jehangir at Agra, where he stayed for three years, but failed to persuade the Grand Moghul to enter into a formal treaty or agreement with the English company. The intention of Captain Hawkins as to what he was seeking in India can best be gathered from his interview with the chief customs officer at Surat, which is described in his own words as follows:

> "After many complements done with the Chief Customs Officer, I told him that my coming was to establish and settle a factory in Surat and that I had letter for his king from His Majesty of England sending to same purpose who is desirous to have league and amitie with his king in the kind that his subjects might freely go and come, sell and buy as the custom of all nations is, and that my ship was laden with the commodities of our land which by intelligence of former travellers were vendible for these parts."[62]

Hawkins was followed by Sir Thomas Roe and the latter was commissioned by King James I to renew negotiations with the Moghul Emperor. Roe's mission to the Moghul Court could not produce a commercial treaty as the Moghuls had an established state practice of granting freedom of trade to foreigners unilaterally on the basis of royal decrees or *firmans*. Mention has already been made of the embassy of Sir Thomas Roe who was sent with an *ad hoc* purpose, to negotiate a trade agreement. The royal *firman* or order which was obtained by the efforts of Sir Thomas was not a treaty since it was revocable at any moment at the will of the Emperor. Terry's account of what *firmans* were is reproduced below:—

"The Moghul sometimes by his *firman* or letters patent

61. Pant, *The Commercial Policy of the Moghuls*, p 169.
62. *Hawkins' Voyage* (Hakluyt Society), p. 390.

> will grant some particular thing unto single or divers persons and presently after will contradict those grants by other letter excusing himself thus: *that he is a great and absolute king and therefore must not be tied unto anything*, which if he were he said that he was a slave and not a free man. Yet what he promised was usually enjoyed altho he would not be treated to a certain performance of his promise ".

As a result of these trade concessions, the English established a factory at Masulipatam in 1611 A D. In 1632 A.D. the Sultan of Golconda, by a golden *firman*, permitted the Company to trade in the ports of Golconda on the payment of 500 pagodas a year.[63]

In this connection, it may be mentioned that both the Portuguese and the French received similar *firmans* from the Moghuls or the potentates of south India. Thus Emperor Shah Jahan in consideration of the medical services rendered by Gabriel Boughton, the Company's surgeon, conferred privileges of trade on the French in Bengal.

A commercial *firman* in so far as it was negotiated between two sovereign parties, may represent at best an agreement between them. The sovereignty of the Moghuls was never questioned by any of the European powers which came in contact with them. The East India Company or at least the ambassadors sent by the kings of England represented the sovereignty of the British Crown and they applied the then known principles of international law in their relations with the Moghuls. Thus the *firmans* were negotiated on a treaty basis though in character they were merely royal orders granting concessions.

B. *Treaties Enforceable in War.*

As stated earlier, the only example we have of a treaty which was meant to be enforced during war is the one signed by the kingdoms of Vijayanagar and Bahmani in South India concerning the treatment of prisoners of war. History records that for

63. *The Cambri'.e History of India*, Vol. V, pp. 83, 88.

several decades the kingdoms of Bahmani and Vijayanagar were in a state of war with each other and both sides indulged in capturing and brutally slaving their prisoners of war in large numbers. The Bahmani kingdom perhaps started the practice which was followed by the Vijayanagar kingdom, if nothing else, as a retaliatory measure. Thus when both sides were indulging in this inhuman practice, good sense and logic appears to have prevailed at last in 1367 A.D., as is seen from the following account:—

> "...being reproached by the ambassadors of Vijayanagra for indiscriminate massacre of Hindu women and children, Muhammad Shah 'took an oath, that he would not, hereafter, put to death a single enemy after a victory and would bind his successors to observe the same line of conduct'. Farishta.....observes: 'From that time to this, it has been the general custom in the Deccan to spare the lives of prisoners in war, and not to shed the blood of an enemy's unarmed subjects'."[64]

Cementing of Treaties

As the Heads of states rarely met to negotiate treaties, it was an essential feature of a mediaeval treaty that it be duly ratified before it became binding. Since a majority of treaties were negotiated by *vakils* or envoys or emissaries, they were not accepted as binding until the ratification of the Head of the state was forthcoming. It often happened that one of the parties was a sovereign but the other party was represented by a *vakil* who had no powers to commit his master and ratification, therefore, became essential. A typical example is furnished by the treaty negotiated by Waiz Mirza, the representative of Babur, with the Shah of Persia invoking the latter's help to obtain Samarkand for Babur. It is clearly reported that the Shah of Persia sent military assistance after Babur had solemnly rati-

64. *Farishta* translated by Briggs, in the *Delhi Sultanate* (ed. by R.C. Majumdar), pp. 252-253; *Cambridge History of India,* Vol. III, p. 382. It must be added, however, that Farishta's account is not free doubt. Cf. Majumdar, *op. cit., supra.*

fied the treaty negotiated on his behalf by Waiz Mirza. It is recorded by contemporary historians as in *Tarikh-i-Rashidi* that "promptly ratifying the proposed agreement, Babur asked for speedy and effective support" from the Shah.[65]

Similarly, according to the customary practice of the states of Aryavarta, ratification was essential and this fact was solemnly accepted by the Islamic states in their conduct with the states of Aryavarta. Thus Babur mentions in his memoirs that the envoy who came on behalf of Rani Padmawati of Ranthambhor to negotiate a treaty for the transfer of the fortress for an annuity of 70 lakhs was required to report back to the Rani what had transpired between the envoy and Babur. Again Babur records that "Asuk (the envoy) had himself been with Padmawati, Vikramajit's mother, and had explained to the mother and the son everything that had passed. They approved of Asuk's proceedings and agreed to make the necessary arrangement...."[66] This account clearly indicates that not only the Islamic states in their relations *inter se*, but also the states of Aryavarta in their relations with Islamic states, accepted the need for ratification.

Again, the correspondence exchanged by Emperor Humayun of Delhi with Sultan Bahadur Shah of Gujarat expressly mentions the ratification of a treaty after which it had become sanctified and binding. The relevant details from the letter of Humayun to Bahadur Shah are given in the following account.

> "After acting upon the laws of thanks to and praise of the Almighty to whom be glory for His bounties and after laudations to the Prophet on whom be peace, be it stated that when Kazi Abdul Kadir and Muhammad Mukim reached this celestial threshold and gave information of the ratification of the agreements and treaties (between our Governments) the hope of the restoration of good understanding between ourselves which is a sure source of peace for the good of God's creatures

65. *An Empire Builder of the Sixteenth Century*, by L. F. Rushbrook Williams (1918), p. 103. Cf. *supra*.

66. *Memoirs of Zahiruddin Muhammad Babur*, *op. cit.*, Vol. II, p. 342.

and the prosperity of towns and cities, impressed itself on my mind."[67]

Another example of state practice in regard to the need for ratification of treaties is to be had from the negotiations conducted in 1613 A.D. by Prince Khurram, the son of Emperor Jehangir, with the Maharana of Mewar. The latter sent two of his officers to Prince Khurram's headquarters under a flag of truce to negotiate an agreement to terminate warfare. It is recorded by contemporary historians that Prince Khurram employed a Brahman envoy by the name of Sunderdas who was deeply attached to him. The peace conditions offered by the Maharana were strongly urged by Sunderdas to be accepted. As a result of this advice, Khurram informed the Rajput envoys that the final decision must rest with the Emperor, who was in Ajmer. The Prince could, therefore, only send the Rajput envoys to Ajmer under a special safe conduct to lay their peace proposals before Jehangir in person. Thus Sunderdas and the Prince's private secretary, Mulla Shirazi, a learned Muslim divine, accompanied the envoys and Sunderdas was the bearer of a letter from Khurram to his father in which the Prince urged the Emperor most strongly to ratify the terms of the treaty which had been negotiated between the Rajput envoys and himself. It is recorded that Jehangir's reception of the Maharana's ambassadors was most courteous and left little doubt in their minds as to the attitude he intended to assume in regard to the ratification of the proposals of peace settled by Prince Khurram. The Emperor suitably entertained the ambassadors and then wrote a letter to his son, warmly praising and congratulating him for his success in negotiating favourable terms. The Emperor then sent a *firman* or royal decree granting Prince Khurram the right to conclude a treaty of peace on the lines proposed by the Maharana. This clearly indicates that ratification of a treaty was essential and in this particular case the Emperor authorised his son to ratify the negotiated treaty in accordance with a royal decree specially promulgated for the purpose. A treaty was accordingly

67. *Mirat e Sikandari* or *The Mirror of Sikander*, by Sikander, the son of Muhammad alias Manjhu, (Gujarati, translated by Faz lullah Lutfullah Faridi,), pp 181-182.

concluded, binding upon the Maharana and the Emperor, by which the latter agreed to restore the ancient capital of Chittor on condition that the Maharana would not rebuild the fortifications which had been destroyed by Akbar.[68]

CONCLUSION AND RATIFICATION OF TREATIES

The state practice in mediaeval India in regard to the conclusion and ratification of treaties cannot be said to be uniform for the reason that there were several sovereign entities apart from the Imperial state of the Moghuls at Delhi. A careful scrutiny of the formalities observed in concluding binding treaties would reveal the existence of two different schools or types of state practice in vogue. The first one related to the treaties concluded by sovereign states such as the Kingdoms of Bijapur and Golcunda with Imperial Delhi, which may be said to be more or less uniform depending, however, upon the importance attached by the Moghul Emperor to the treaty concluded with different potentates of India big or small in size and varied in their political influence and power and prestige. The second type noticeable in regard to the processes associated with the conclusion of treaties such as the affixation of seals, etc., was symbolised by treaties concluded between two potentates other than the Moghul Emperor of Delhi.

As, however, most of the important treaties could be related to the Moghul Empire, it may be worthwhile examining the formalities associated with the conclusion of treaties to which the Moghul Emperor was a party. Such treaties were partly in Arabic and partly in Persian. The initial invocation was in Arabic but usually the text of the treaty was in Persian. The court language being Persian, the text had to be in Persian. In this regard, the Emperors at Delhi dictated the language when they signed treaties with other Indian potentates. To illustrate the three requirements which were associated with the conclusion and solemn ratification of treaties of special importance, it may be worthwhile analysing the *Firman* of Emperor Shah Jahan, a

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68. *Vir Vinod* (in Hindi), available in the archives of the Maharana of Mewar.

photostat copy of which is reproduced opposite this page. This *Firman* concludes and ratifies a treaty between the Moghul Emperor Shah Jahan and King Adil Shah of the famous Kingdom of Bijapur in Deccan (South India). This treaty was concluded in May, 1636 and, as far as can be seen, when the terms of the treaty were confirmed by Mohammad Adil Shah, the King of Bijapur, it was on May 16, 1636, that Emperor Shah Jahan sent to him "the solemn *firman* impressed with the mark of the Emperor's palm dipped in vermilion, and, promising with an appeal to God and the Prophet, fulfilment of the conditions laid down therein." The photostat copy of the concluding part of the treaty where the Emperor has affixed his seal in Persian, written the *tughra* in Arabic and given the impression of his *panja* (or palm) in the margin, needs careful study. The *tughra* in Arabic often written in the handwriting of the Emperor indicated always that the treaty was concluded with a sovereign of high status and political importance or the Emperor had a personal liking for another lesser sovereign who happened to be his favourite. A *firman* was not an order to a subordinate as the word may ordinarily imply, but was, in relation to a treaty, a solemn pledge of binding ratification cementing the treaty.

In order to appreciate fully the circumstances which led to the conclusion of the treaty and the historical events preceding it which throw light on the prevalent state practice regarding sending of envoys and their functions, the following extracts from original sources[60] are given:

Emperor Shah Jahan of Delhi and the Adil Shahi Kings of Bijapur (1578 A.D. to 1636 A.D.).

Of all the kingdoms which were formed after the disintegration of the Bahmani Empire, Bijapur was the strongest. It was founded by Yusuf Adilshah about the same time as the Kingdom of Ahmadnagar, and endured for about two hundred years. It came into touch with the Imperial Moghuls during the reign

pp. 150-166; See also *The Central Structure of The Mughal Empire* by Ibn Hasan, pp. 105-106.

A State Document with Shah Jahan's 'Royal Hand and Seal'

The *firman* has been in the possession of the Raja of Behar from whom Mr. Havell had obtained a copy. The plate shows the *panja*, the *uzuk* ceal and the *tughra.*

of its third ruler, King Ali Adilshah of Bijapur. Abul Fazl records the return of Khvaja Abdullah in 1579 and remarks, "Though he (the Adilshah) did not obey orders in the proper manner, yet like other rulers of the Deccan he sent prudent men and choice presents. H.M. sent Hakim Gilani with him (Khvaja Abdullah) as the hearer of salutary advices, and to warn him that if he did not hearken to them, he would be made war upon."[70] Ali Adilshah welcomed the Hakim Gilani and led him to the city of Bijapur with great honour. The Hakim was followed by another envoy Ain-ul-mulk Shirazi, who was accorded a similar reception. Hakim Ali was dismissed with suitable presents, but his colleague was still at Bijapur when Ali Adilshah was murdered[71] in 1581.

* * *

The Emperor of Delhi, Shah Jahan, during his stay at Junnar maintained a friendly correspondence with Ibrahim II, King of Bijapur, who occasionally sent him money. provisions and stores.[72] King Ibrahim II died on Wednesday, September 12, 1627.

After his death his nobles debated the question of succession, and in the end, with the concurrence of the Queen-mother, Badi Sahib Muhammad Adilshah was proclaimed king. Messages of congratulations were received from Shah Jahan who sent Afzal Khan, and Mohammad Qutb-Shah who sent Shaykh Md. Tahir.[73] The King of Ahmadnagar Murtaza II omitted to send an envoy, and his silence was ominous, for, when he broke it, it was to promote the cause of Prince Darvish Mohammad, the rival candidate to the Adilshahi throne. He invaded Bijapur with a large army and inflicted a crushing defeat on the Adilshahi forces led by Ikhlas Khan.[74]

When Shah Jahan heard of the quarrel between the two kings of Bijapur and Ahmadnagar, he sent Shaykh Muinuddin to bring about peace. The representatives of the two kingdoms

70. A. N. Vol. III, p. 388.
71. *Ferishta,* Vol. II, p. 47.
72. *Futuhat-i-Adilshahi,* f. 294.
73. *Ibid.,* f. 297 and f. 315, *Basatin us Salatin,* f. 41.
74. *Futuhat-i-Adilshahi,* ff. 315-19.

met at the house of Mustafa Khan in Bijapur, but the conference came to a deadlock on the question of Sholapur, which neither party was willing to see in the hands of the other. The Adilshahi representative, Abul Fath, who was of an irritable nature, left the council in disgust, and the meeting broke up. Thus Shaykh Muinuddin's mission failed, and the breach between Ahmadnagar and Bijapur remained as wide as ever.[75] But the Imperial envoy was accorded a fitting reception by the Adilshah who gave him rich presents for the emperor.[76]

Meanwhile, the rebellion of Khan Jahan brought Shah Jahan to the Deccan, and he opened his extensive campaign in Ahmadnagar. The two powerful leaders in Bijapur were divided in their attitude towards the Moghuls. Mustafa Khan was favourable to them and was a bitter enemy of the Nizamshah, because his father-in-law Muhammad Lari had been killed by Malik Ambar. He therefore advocated the total extinction of Ahmadnagar in co-operation with the Moghuls. But Randola Khan and some other premier nobles were opposed to this view, and tried to dissuade Muhammad Adilshah from concurring with the opinion of Mustafa Khan. But for the time being the latter triumphed over his opponents, and the King ordered Randola Khan to march to the frontier to be ready to help the Imperialists if they asked for help.[77]

* * *

It was after the submission of Fath Khan that Emperor Shah Jahan was able to turn his attention to the Adilshah, King of Bijapur. On December 3, 1631, he directed Asaf Khan to invade Bijapur with practically the entire army, which had recently been campaigning in Ahmadnagar. From Kandhar to Bhalki the progress of the Imperialists was uninterrupted. At Bhalki the garrison offered resistance, but they were easily overcome.[78] At Kamlapur, Asaf Khan received an Adilshahi messenger, Rizqullah, who brought a letter in which the Adilshah expressed repentance for his conduct, requested for pardon, and promised

75. *Futuhat-i-Adilshahi,* ff. 321-22 b.

76. *Ibid.,* f. 321 b; *Qazuini,* f. 243 b; *Lahauri,* Vol. I, p. 356.

77 *Basatin us Salatin,* f 45 (b).

78. *Lahauri,* pp. 411 12; *Qazvini,* f. 242.

to pay an indemnity. But as Rizqullah was not an accredited messenger of the Adilshah, Asaf Khan did not attach much importance to his mission, and dismissed him.[79] The journey to Bijapur was resumed, and on the way the Imperialists plundered the town and massacred the population of Gulberga.[80] On the Bhima, Asaf Khan reviewed his army, which numbered 30,000.

The Imperialists, encamped between Nauraspur and Shahpur, opened the siege of Bijapur.[81] Daily skirmishes occurred between the besiegers and the garrison, and an incessant fire from the fort prevented the Moghuls from advancing further. Meanwhile some Adilshahi officers opened negotiations for a peaceful settlement with the invaders. First came Shaykh Dabir, and made certain proposals on behalf of Khawas Khan, but they were summarily rejected.[82] Upon this the Bijapuri nobles prevailed upon Mustafa Khan to mediate a peace with the Moghuls, because he was considered to possess some influence with them.[83]

* * *

Both Mustafa Khan and Randola Khan, the generals of King Adilshah of Bijapur, were now united in their desire to conclude peace with the Emperor of Delhi. They instructed their representatives to expedite the conclusion of the treaty with the Moghuls; but when Asaf Khan presented the Adilshahi envoys of the kingdom of Bijapur to the Emperor (there were four of them now staying at the Moghul court),[84] he bitterly complained to them of the faltering attitude of the Adilshah, and his rage grew to such a point that he ordered the execution of Shaykh Dabir and Shah Daud, who had been sent to the royal court by Khawas Khan, but their lives were spared at the intercession of Asaf Khan.[85]

79. *Qazvini,* f. 242 b.
80. *Qazvini,* f 242 b, *Lahauri,* Vol I, p 413, *Hadiqat-us-Salatin,* f. 249.
81. *Qazvini,* f. 242 b; *Lahauri,* Vol I p. 413; *Hadiqat us-Salatin,* f. 249.
82. *Qazvini,* f. 243 b; *Lahauri,* Vol. I, p. 414.
83. *Futuhat-i-Adilshahi,* f. 323 b; *Hadiqat-us-Salatin,* f. 249.
84. They were Shah Daud, Shaykh Dabir, Qazi Abu Said and Mir Abul Hasan.
85. *Futuhat-i-Adilshahi,* f. 348 b.

At last, Emperor Shah Jahan agreed to conclude peace, and the terms of the treaty were drawn up. King Adilshah of Bijapur was to recognise the Moghul sovereignty, to pay two million rupees as peace offering, to maintain peace with Golconda, and to submit it to the Emperor's arbitration as regards his quarrel with the Qutb-Shah. Further, Shah Jahan defined the boundaries of Bijapur, and assigned a part of the Nizamshahi territories to the Adilshah. And finally, each side undertook not to seduce the officers of the other from their master's side; and the Adilshah agreed to co-operate with the Moghuls in reducing Shahji to submission, if he did not surrender Junnar and Trimbek. When these terms were confirmed by Muhammad Adilshah, Shah Jahan sent to him on May 6, 1636, "a solemn *farman* impressed with the mark of the emperor's palm dipped in vermilion, and promising with an appeal to God and the Prophet, fulfilment of the conditions laid down therein." Makramat Khan arrived with presents from Bijapur on July 11, of the same year.[86]

Henceforward, until the death of Muhammad Adilshah, relations between the Moghul and the Adilshahi courts remained, on the whole, peaceful.

* * *

As far as the *firman* is concerned, the following account[87] has been given by Ibn Hasan:

The mark of the royal hand was the highest distinction, but I have not found any case in which it was put on a *farman* to any royal servant, nor have I been able to find any example of its use at all under Akbar, but the cases under Emperor Jahangir and Emperor Shah Jahan indicate that it was a practice prior to them, and a reference in Emperor Jahangir's memoirs about Emperor Akbar's panja being engraved on the trunk of a tree in Shaikhupur village, in the pargana of Daulatabad, gives a further clue. Emperor Jahangir had its likeness, to-

86. *Qazvini*, ff. 381-83 b; *Lahauri*, Vol I, Pt. II, pp 167-74; *Futuhat-i-Adilshahi*, ff 349-51.

87 Ibn Hasan, *The Central Structure of The Mughal Empire*, pp. 105 106.

gether with the mark of his own panja, engraved on a marble plate and placed it on the same spot.[88]

In the ninth year of Jahangir's reign, the Rana of Udaipur demanded the royal panja as a condition of the treaty into which he entered after his defeat at the hands of Prince Khurram, and the condition was complied with.[89]

Emperor Shah Jahan himself offered it to Adil Khan, the King of Bijapur, as a mark of distinction, if he complied with the conditions of the treaty submitted to him; the panja was given and the gist of the *farman*, which contained the terms of the treaty, was engraved on a gold plate at the request of Adil Khan, and sent to him as a special mark of favour.[90]

Muzzaffar Khan in one of his letters requests that the panjah-i-mubarak be sent to Jagat Singh, against whom he was engaged, though the royal *farman* was enough yet the panjah-i-khasa-i-shahan-shai is necessary for him to sanctify the Treaty and give it the blessing and exaltation.[91]

The facsimile of Shah Jahan's panja on a *farman* gives a clear idea of the form in which the *tughra*[92] on the left, the seal on the right, and the *panja* on the margin below it, were stamped.[93]

88. *Tuzuk*, p 178 Rogers, p 360. 'At the time when my revered father passed by this, he had made an impression of his hand by way of mark at the height of 3¾ gaz from the ground. I ordered them also to make the mark of my hand 8 gaz above another root (it was a huge tree with several roots). In order that these two hand marks might not be effaced in the course of time, they were carved on a piece of marble and fastened on to the trunk of the tree (and a platform built round it).

89. *Tuzuk*, p. 134.

90. *Lahauri*, I, p. 124; II, pp. 203-4.

91. MS. Add. 16,859, F. 20. Probably it refers to the expedition of the fifteenth year of the reign against the fort of Taragadh in Kangrah (Panjab), but *Lahauri* does not mention the panja. Hence it is not certain whether it was given to him or not (*Lahauri*, II, pp. 285 91, for terms of his surrender).

92. The tughra of Shah Jahan contained these words: 'Abul Muzzaffar Shahab-ud-din Muhammad Sahib-i-Qiran-i-Sani'.

93. The facsimile is copied from Plate II (p. 15), in the late E.B. Havell's. *Agra and the Taj*, by kind permission of Mrs. Havell.

Ratification by Seal of Kazis or on Oath

The need for ratification was so well-recognised that when there was an urgency and time would not permit envoys to move to and fro to obtain ratification, the terms offered by one party were accompanied by 'a deed given under the seal of the Kazis and the Chiefs.' This fact has been brought out earlier when describing the treaty between Daulat Khan and Alam Khan or Alauddin Lodi (1525 A D.). The seal of the Kazis signified taking a pledge on oath and amounted, therefore, to a solemn ratification on the part of the parties making it. In other words, it represented an offer which was capable of acceptance by the other party and the result would be a binding contract or agreement between the two.

Another instance of an agreement being solemnised by the taking of a regular oath is to be had in the peace treaty signed with Daud by Khan-Khanan, the General of Emperor Akbar Daud had proclaimed himself the ruler of Bengal and Bihar after the death of Sulaiman Kirani in 1574 A D He had refused to acknowledge the allegiance of imperial Delhi and Akbar, therefore, decided to subjugate him. *Tabakat-i-Akbari* describes the conclusion of peace with Daud as follows:

> "Daud had suffered several defeats in succession, and Gujar Khan, his mainstay and support, was slain. Death stared him in the face; so, in his despair and misery, he sent a messenger to Khan-Khanan with a message to this effect: 'The striving to crush a party of Musulmans is no noble work. I am ready to submit and become a subject; but I beg that a corner of this wide country of Bengal sufficient for my support may be assigned to me. If this is granted, I will rest content, and never after rebel' The *amirs* communicated this to Khan-Khanan, and after considerable discussion, it was determined to accept the proposal, upon the condition that Daud himself should come out to meet Khan-Khanan, and confirm the agreement by solemn binding oaths."[94]

It would thus appear from the aforesaid account of mediae-

val treaties that whenever an arrangement or an agreement had to be negotiated between two sovereign states, requiring effective implementation, the method adopted was to enter into a solemn treaty which was reduced to writing and accepted as binding after ratification. In this regard, the basic features of a modern treaty are to be found in the practice of the mediaeval Indian states. Though there were no law-making treaties as such, there were certainly multilateral agreements signed by more than two or three states either constituting a military pact or an alliance to fight an enemy or to act in close collaboration and friendship with each other. In this section we have not considered the treaties or arrangements representing the subordinate cooperation of certain Rajput states such as that of Amber (Jaipur) with the Moghul Emperors of Delhi. Though the Rajput rulers who entered into such subordinate political relationship were independent initially, they may be said to have lost that status once they accepted the positions of generals and governors under Emperor Akbar. Such would appear to be the position of Mirza Raja Man Singh and Jai Singh in the Moghul empire. Thus the *firmans* and the *khillats* which issued from imperial Delhi were more by way of orders of the imperial government rather than treaties between two sovereign powers. Nevertheless, the abundance of such *firmans* as well as treaties in the middle ages, particularly during the Moghul regime, indicates the extensive development of intercourse among states, whether Islamic or non-Islamic. The institutions of treaties, envoys and emissaries received a further impetus with the advent of British rule in India. The development of commercial treaties between the Moghul Emperors and the foreign powers such as the Portuguese and the British who sought concessions and terms for the development of their trade and commerce in the country, constitutes a study by itself These treaties were bilateral in character and more contractual than law-making. This constitutes a feature of the modern period of Indian history.

91. Elliot and Dowson, *The History of India as Told by Its Own Historians*, Vol. V, pp. 388 389.

RIGHT OF ASYLUM IN MEDIAEVAL STATE PRACTICE

The international law of asylum as it has evolved now after a process of development spread over centuries of state practice, confers on every sovereign state the right to grant or refuse shelter to an alien In mediaeval India the right of granting shelter to a political refugee who had surrendered and begged for protection was accepted as the very essence of sovereignty and gave rise to many complicated problems of inter-state relationship The concept of protecting the one who has surrendered dates back to ancient Indian history and mediaeval India accepted this state practice. The Sultans of Delhi and the independent kings of Malwa, Gujarat and the Rajput states, particularly Chittor or Mewar, cherished it as the most noble right of an independent state. The home state of the refugee invariably always took umbrage at the grant of asylum by any foreign state. There are instances of wars being fought in the exercise of such a right. Out of several cases illustrating the grant of asylum the following are cited as explaining the legal position

(a) *King Bahadur Shah of Gujarat gives asylum to Muhammad Zaman Mirza, Governor of Bihar under Emperor Humayun, and Humayun's resentment*

Humayun, suspecting the loyalty of Muhammad Zaman Mirza who was not only his brother-in-law but was also descended like himself from Timur, and who had been appointed by Babur as governor of Bihar, had him removed from office in 1533 and placed him in confinement at Bayana Muhammad Zaman, however, managed to escape from Bayana and offered his services to Bahadur Shah, King of Gujarat, while a cousin named Muhammad Sultan and his sons who had been plotting with him were seized and sentenced by Humayun to be blinded. The peaceful relations which existed between the Sultan of Gujarat and the Emperor at Agra were broken by the refusal of Bahadur Shah to turn away the fugitive and by the terms of the letter sent in his name to Humayun.[88] Humayun, whose relations with Bahadur Shah had hitherto been perfectly friendly, took umbrage at the latter harbouring the fugitive and his follow-

ers, and a correspondence ensued which led to a permanent rupture between the two monarchs. Two of the letters which passed between them have been preserved in their entirety and offer a striking picture of the diplomatic methods of that day. Humayun pointed out that although his ancestor Timur had desisted from attacking the Ottoman Sultan Bayazid while the latter was engaged in fighting the Franks, he had protested against Bayazid's harbouring princes who had rebelled against himself. Humayun, therefore, demanded that the prince should be either surrendered or expelled. To this, Bahadur, who is said to have dictated his reply when in his cups, sent a most insulting answer, in which he sarcastically suggested that Humayun had boasted of the exploits of 'his sire seven degrees removed' because he himself had achieved nothing worthy of record.[96] The correspondence between Humayun and Bahadur Shah of Gujarat as recorded in *Mirat-e-Sikandari* is worth reproducing here in its entirety:

" 'Then commenced a correspondence between Sultan Bahadur and the Emperor Humayun which had for its object the demand that Muhammad Zaman should not be given refuge.[97] The second letter from Humayun to Sultan Bahadur is produced here verbatim:—

"After acting upon the laws of thanks to and praise of the Almighty to whom be glory for His bounties and after laudations to the Prophet on whom be peace be it stated that *when Kazi Abul Kadir and Muhammad Mukim reached this celestial threshold and gave information of the ratification of the agreements and treaties* (*between our Governments*) the hope of the restoration of good understanding between ourselves which is a sure source of peace for the good of God's creatures and the prosperity of towns and cities, impressed itself on my mind. It never occurred to me that you would after that transgress the limits of the meanings of (the Quranic verse), *Oh ye true believers*

95. *The Cambridge History of India,* Vol. IV, p. 22.
96. *Ibid.,* Vol. III, p. 329.
97. The writer quotes some of the verses of the first and second letters of Humayun to Bahadur Shah, which are omitted here.

perform your promises, and set at naught the behest of the Prophet (on whom be peace), *Verily the fulfilment of a promise is the best form of faith.* Whereupon I sent Islah-ul-mulk Maulana Kasim Ali Sadr and Ghias-ud-din Kurchi with the message that if your Sultanic Majesty are with all that has passed still firm in the old and established usage of amity, it would be proper that you should send to my court that band of men who have chosen the road of baseness to our bounties and have escaped to seek refuge with you, or drive them from your presence and country. It was also desired that you may not in future instigate the servants of this state to follow their example. It was expected that the persons here alluded to would bring back a definite reply from your Majesty to these requests, so that the dust of ill-will should be washed away by the waters of amity and the tree of friendship again bear fruit. When the above-mentioned persons and Nur Muhammad Khalil reached the foot of this lofty throne and delivered the agreement they were charged by you that the contents of the above agreement did not seem to be as satisfactory as we hoped would be. This caused great astonishment You write about Muhammad Zaman Mirza that in spite of such treaties and engagements existing between the former emperors of Delhi and the late Sultan Muzaffar, that Sultan Sikander, and Sultan Alauddin and many other Sultans have come to Gujarat and have been received and provided for according to their conditions without thereby causing any breach of friendship between the ruler of Gujarat and the emperors of Delhi and that in the same way if Mirza Muhammad remained with you and was well received, it does not matter. This is not an argument in point. Let it not be concealed that the only mode of preserving friendship between us is that you concede my wishes and send these misguided people to the lofty throne or refrain from protecting them, or keeping them in your country. If you act thus your faith will be clear as the sun in middle meridian. You will act thus if your thoughts go in accord with your professions and your acts agree with your words. If not, by what agreement can faith be placed in your treaty? It is probably known to your Sultanic Majesty that the world conquering Lord (Tamerlane), may God heighten the glory of his name, had several differences with the Sultan of Runa, Karim

Bayazid (Bajazet) and though many signs of hostility appeared from that ruler, he did not think of laying waste the Kingdom of Rum, because Bajazet was engaged in fighting the Franks. When Fara Yusuf Turkoman and Sultan Ahmed Jaldir fled from fear of the victorious army (of Tamerlane) and took refuge with Bajazet, the world conqueror desired Bajazet not to give these men shelter and intimated to him the advisability of expelling them from his territories. When Bayazid Ildarim (Bajazet) turned his face from these friendly hints, what fate had ordained, came about.

Couplet

> If, in the house of virtue there is anyone to him from Sa'adis speech a word is enough (meaning *verbatim sat sapienti*).

" 'What more should I write Peace on him who followeth the path of rectitude'.

> *"The communication addressed by Sultan Bahadur to Humayun.*

" 'After opening the word in the name of the Omniscient King and perfuming the sense of smell with the praise of peace to and prayers for the Best of the created (that is the Prophet) on whom be peace! be it shown, that, what was sent by the chosen person of the sublime court, Nur Muhammad Khalil, reached this court and obtained the honour of kissing the edge of the carpet, and the letter of wonderful contents, was also delivered and its proud meaning has been understood by this Sultanic court. It is among other things, written that Kasim Ali and Ghiasuddin were sent to represent to me that the signs of truth and amity would appear if the refugees to this court were expelled from the guarded dominions of Gujarat. Verily this is a sheer falsehood, for had your Majesty's delegates spoken to me even a word on any subject except the general subject of amity and peace existing between us and of the treaties thereabout, matters would not have reached this crisis—a crisis which has obliged your Majesty to advance as far as Gwalior. This is a bad idea and crude ambition. It is known to all high and low that

your Majesty had entered into strong agreements and stringent treaties with that descendant of a princely house, Sultan Muhammad Mirza, and had strongly ratified them by oaths of friendship and brotherliness. When your Majesty had the upper hand of him you broke the agreement and turned your face from all truth and fidelity and hastened towards hostility and enmity. The prince above alluded to had heard from the sons of the world, the fame of this house for bestowing thrones and conquering dominions, and had heard how Sultan Mahmud Khilji, after the treachery and tyranny of the Hindus had taken refuge in this court, and how the late Sultan Muzaffar (may Heaven be pleased with him and make paradise his lodging!) had taken up his cause. In the same way I have also given merciful heed to the complaints the Mirza had made, the evils he has had to suffer at the hands of promise-breakers and considering the aid of a Muslim in distress (in the words of the Prophet, on whom be peace: "Help thy brother in distress") incumbent on me, I have thrown on him the shadow of my patronage and protection in the hope that by the favour of Allah his hopes and my endeavours may bear abundant fruit. Though the constancy of your agreements had become clear and undoubted still in the presence of Kazi Abul Kadir and Muataninwaz-Zaman, of Khurasan, I agreed to an oath on the Kuraan because of the goodness of my own intentions, the purity of my motives and the charity of my thoughts for every Muslim, and I consider that enough and binding. In these days as the necessity of uprooting the foundation of the Firangis appeared pressing I had to go to the port of Div. Your Majesty immediately on hearing this took opportunity to push on as far as Gwalior dismissing from your mind the Kuraanic precept, *Break not your agreements after their ratification.* It was not in the way of keeping agreements that your Majesty ordered the sermon of that place to be read in your name. Your Majesty who have not the grace to offer apologies for such a conduct consider yourself justified in dismissing my apologies unheard. Truly your Majesty's acts, as well as writings, savour of great intrepidity. I suppose your boasting of the exploit of your grand sire seven degrees removed (*Tamerlane*) is of a piece with it. Had you been able to write of a bit of

your own achievements it would have been something. But it seems your Majesty's performances have not reached the stage of being spoken or written about. Probably the putting together of a long stringed narrative was all that your Majesty wished for. It is a pity your Majesty did not think of the smallest of my exploits, if only to edify yourself by taking an example therefrom.

Couplet

If thy sword has not the strength fit for prowess
Wield not the sword of thy tongue!
If thou art dimunitive in size
Walk not on stilts to appear tall in the eyes of the boys.
If thy falchion wants in mettle my boy
Oppose not with it the wielder of a nobler blade.

" 'By the help of God and by His grace it is known to all that as long as the throne (*of this country*) is graced by the occupation of this Presence (*meaning himself*) no ruler has had the strength or courage of opposing his powerful armies, whereas, your Majesty are engaged in contest with a low Afghan. Why do you inflict such a headache (as that of thinking of fighting with me) on yourself? According to the (*Kuraanic*) precept, *'let not Satan mislead you.'* Your Majesty should not permit pride to take possession of you Surely, in a few days whatever is the wish of the Creator shall appear.

'Couplet

The devotee asked for a drink of water of the Heavenly Fountain
Kausar, and Hafiz demanded a cup of wine,
Let the result show what in respect of each is the wish of the Creator!'

"They say that the Sultan being illiterate ordered the despatch of this letter just as it was written by Munshi Mulla Mehmud without becoming acquainted with its beauties or defects, and so

it was sent. This Mulla was in the service of Humayun and had earned his disfavour. This stupid person with these motives wrote the letter which became the cause of kindling this fire of dissension."[98]

(b) *King of Malwa offers asylum to a feudatory Chieftain of Maharana Kumbha of Mewar*

As Mahpa Panwar, one of the assassins of Maharana Mokal of Mewar, was given shelter by the Sultan of Mandu (Malwa), a demand for his person was made by the ruling Maharana. Sultan Mahmud Khilji, however, declined to surrender the refugee, pleading that it was against all notions of dignity and sovereignty to do so. The Maharana thereupon prepared for hostilities and left Chittor to attack Mandu The Sultan advanced with a powerful army to meet the Maharana.[99] In this case the grant of asylum led to a regular war.

(c) *Raja of Gwalior gives asylum to King Husain Shah of Jaunpur*

Again, during the protracted contest, in the reign of Buhlul Lodi, between the kingdoms of Delhi and Jaunpur, Raja Man Singh of Gwalior espoused the cause of the latter and gave asylum to its last King, Husain Shah of Jaunpur, when he was fleeing before his enemies.[100]

(d) *Rana of Mewar grants asylum to Baz Bahadur, King of Malwa*

Baz Bahadur conquered the whole of Malwa and maintained his rule in Mandu till Akbar's superior strength compelled him to flee from Malwa, when defeated. Thus Baz Bahadur had to take refuge in Mewar where he sought the protection of the reigning Maharana, Udai Singh, who gave him asylum and treat-

98. *Mirat e-Sikandari* or *the Mirror of Sikandar*, by Sikandar, the son of Muhammad, alias Manjhu (Gujarati, translated by Fazlullah Lutfullah Faridi), pp 181-182, 185

99 Hari Vilas Sarda, *Maharana Kumbha*, p 49

100 *The Cambridge History of India*, Vol III, p 533

ed him like a sovereign. Baz Bahadur dwelt in Chittor, until finally tiring of a life of exile, he offered his submission to Akbar. After a short period of imprisonment, Baz Bahadur was invited by the Emperor to Agra where he was given the highest rank of nobility.

The grant of asylum, as stated earlier, was a common practice since it was accepted as a sacred attribute of sovereignty and based on considerations of humanity, the surrendering person had to be given protection. In the case of the shelter granted by the Sultan of Mandu to the assassin of Maharana Mokal, there was no extradition treaty between the two states and hence the exercise of the right of asylum by one state led to immediate warfare, which was a common feature of mediaeval state practice in such cases.

CHAPTER VII

LAW OF WAR

CONCEPT OF JEHAD AND THE QURANIC PHILOSOPHY OF WAR

Concept of Jehad

The word *jehad* stands for an effort or striving in Allah's path which in practice came to denote the spreading or propagation of the true faith with a view to making Islam the religion of the world In view of the numerous wars of expansion waged by Islamic states in the 8th century A D, *jehad* may have come to connote violence and warfare as essential ingredients of the concept and spread of religion which followed in the wake, as its true *raison d'etre*. However, a study of the legal theory and the *Quranic* basis of the concept of *jehad* would soon reveal that violence was not its inescapable ingredient. If *jehad* stands for striving and exerting in the path of Allah, it does not *ipso facto* mean that sword would be the only instrument for that striving. In fact the spread of the faith could be resorted to by persuasion and the prophet had accordingly preached that the peaceful and persuasive methods were to be tried out first and use of force or violence in war was the last resort. In *Sura II* which is regarded as the Medinien version of the *Quranic* verse, the Prophet said: "Fight in the way of Allah, those who fight you but do not provoke hostility; Verily Allah loveth not those who provoke hostility."[1] In theory at least the existence of this *Quranic* verse certainly reminds one of the principle of *Sukraniti*:

उपायान्तर नाशेतु ततो विग्रहमाचरेत

1. *Quran*, Sura II, 186 Translated by Richard Bell, p. 26.

(War is to be resorted to as a last remedy when all other means have failed).

Thus compulsion by the sword was permitted by the Prophet only when persuasion by peaceful means had failed. The jurists have, therefore, defined four different ways in which the obligation of *jehad* could be discharged. These were: first by his heart; second by his doings; third by his hand; and the fourth by his sword.[2]

It could perhaps be argued that in Islam the waging of war had to be for a justifiable reason and propagation of the faith was one such reason definitely accepted. There were also certain formalities inherent in the declaration of war inasmuch as the institution of initiation and the grant of notice of three days before war commenced was so inherent in the system that *jehad* had the basic ingredients of the Roman concept of *bellum justum.*

Political Aspect of Jehad

Though *jehad* may have come to be regarded as religious war, the political aspect relating to expansion of the Islamic state was not a mere consequential factor. In certain cases political aggrandizement became the primary motive and religion often became the inevitable consequence and hence a secondary factor attending the political need for expansion. The motive of the Islamic state in waging *jehad* was the establishment of Muslim authority so essential for propagation of the faith on a permanent basis and hence *raison d'etat* often became the main motive for the employment of force and resort to war. The individual obligation in respect of *jehad* thus soon got converted into the obligation of the community and hence *jehad* became an instrument of the state and not a responsibility of the individual. In fact, it has been argued that in its origin *jehad* was political in character inasmuch as the Prophet had to focus attention on a unifying objective to discourage warfare amongst

2. Ibn Hazm 'Kitab al Fazl fial Milalwa' l-Ahwal wa'l Nihal (Cairo H H. 1321), Vol IV, p. 135.

the Arabs. In this direction Islam outlawed all war except *jehad* so that the Islamic tribes would not only be prevented from slaughtering their own brethren but their attention would be diverted to fighting the non-Islamic elements, which would bring them together internally and thus create unity and peace within the Islamic world at least. Thus *jehad* constituted, as it were, the permanent basis of the relations of the Islamic state with its neighbours even though no actual fighting might be involved.

Moreover, in the process of evolution, *jehad* had to fit in with the world conditions since Islam could not always dominate everything everywhere. There were Islamic states which had to enter into peaceful relations with the enemy and hence the jurists began to re-interpret the law so as to justify the suspension of *jehad* in certain circumstances. Again, when the era of Islamic expansion was over, theorists appear to have admitted that the principle of *jehad* representing a permanent war had become obsolete. There might not have been the abandonment of the duty of *jehad* but the facts of life compelled admission of suspension of *jehad*. As years rolled on *jehad* may be said to assume a dormant status. It was, however, in theory, left to the Imam to revive it. This aspect is very prominently reflected in the Shia legal philosophy. As *jehad* had been regarded as the principal function of the Imam, it was obvious that with the disappearance of the Imam, the declaring of *jehad* was automatically placed in cold storage. The resumption of *jehad* in the Shia doctrine would be dependent on the return of the Imam and this theory has suited the facts of world life more than the original concept of a permanent war with *Dar-al-Harb*.

Among wars of various kinds described in Islamic legal theory, *jehad* is by no means the first and the last. Ibn Khaldun records tribal warfare as the first reflecting the origin of war as it existed among the Arabian tribes. The second category is that of feuds and raids whereas the third is the war prescribed by the *Saryat, i.e., jehad*. The fourth type of warfare is against rebels and dissenters. As against this practice in Arabia, the Indian practice has been dealt with subsequently wherein 'Humayun' enumerates various kinds of legitimate warfare based on experi-

ence gathered by the Islamic state during several centuries of evolution.

Kinds of Jehad

It appears that jurists and Muslim divines classified *jehad* into two categories, namely, *jehad* against believers and *jehad* against non-believers. The former appears to have been further divided into three types, namely, *jehad* against apostasy (*al-vidda*), *jehad* against dissension (*al-boghi*) and, thirdly, *jehad* against secession (*al-muharitun*). Again, *jehad* against the people of the Book or the scriptures is a category often added to the former three. In addition, the political aspect of *jehad* becomes clear on account of the existence of *jehad* against highway robbers and disorderly elements *Quran* lays down the punishment to be meted out to those who "commit disorders on the earth, as it observed that they should be slain or crucified or have their hands and their feet cut off." (Q V. 37).

Initiation of war as an essential condition of Jehad

As *jehad* is initiated by calling the believers to battle, there is a clear declaration furnished in the shape of this call which may be said to create a legal state of hostilities. The Imam appeals to the believers and in this respect is entitled to send messages to the provinces which would indicate the intention of the Islamic state to resort to war. This declaration of *jehad* may, however, be regarded as an internal act and a measure taken by the Islamic state for making preparations for a war. If by itself this was not regarded as a sufficient notice of declaration of hostility to the non-Islamic world, there was a definite duty laid down by *Quran* in regard to the necessity of "invitation". A *jehad* must necessarily be preceded by an "invitation" to Islam. It is only when there was failure to accept the new faith or to pay the poll tax that fighting became inevitable and had to be permitted. Allah himself is reported to have said, "we never punish until we had first sent an apostle." Thus an invitation had to be sent to the unbelievers to ascertain whether they would accept Islam or pay the poll tax or fight. Some jurists

have held the view that even if the enemy had already received an invitation, it was necessary to renew it before resorting to war.[3]

Negotiations as an essential feature before declaration of Jehad

The Islamic practice in the mediaeval world, of which little evidence is found in mediaeval India, required the Muslim commander to wait for three days after the invitation had been sent to accept Islam or to fight. This period which may be regarded as an ultimatum was often utilised by the Muslims to negotiate with the enemy. In some cases the existence of this "cooling off" period of three days resulted in peaceful settlement of a dispute. We have, for example, the surrender of a number of towns in Iraq and Syria on the basis of this three-day negotiating period. Again, such negotiations led to the signing of treaties to avoid war and after the battle there was a common practice to negotiate for exchange of prisoners of war.

Jehad and the payment of Jizia

The three alternatives which were posed to the non-Islamic states of *Dar-al-Harb* were: Islam, *jizia*, or *jehad*, in that order. If political entity of *Dar-al-Harb* accepted Islam there was neither *jizia* nor *jehad*. On the other hand, if it accepted *jizia*, there was no *jehad* and acceptance of Islam was not necessary. *Jehad*, therefore, became inevitable only when Islam was refused as a faith and *jizia* was refused as a tax. *Hidya*, a treatise on the Muslim law of the Hanafe school composed sometime in the 13th century A.D., declared that "the Muslims are directed to war upon men until such time as they shall confess there is no God but one God Allah; and when they accept this creed their persons and properties are in protection; if they do not accept the call to the faith they must then be called to pay *jizia*."[4] In the circumstances, if a non-Islamic state agreed to pay *jizia* it could be on terms of friendship and alliance with a Muslim ruler but the payment of *jizia* itself would reduce the

3. *Quduri, al Mukhtasar* (Istanbul Att. 1309), p. 132.
4. *Quran*, XVII, 18.

non-Islamic state to a position of a feudatory in relation to the suzerain, if not sovereign, Islamic state. The institution of *jehad* had thus a political aspect inasmuch as if Islam was not accepted as a creed the political entity of *Dar-al-Harb* would have to owe allegiance to *Dar-al-Islam* and thus indirectly contribute to the territorial expansion of the latter.

There is no doubt that the early wars of Islam were inspired by religious zeal but subsequently political considerations prevailed. Even in respect of the early Muslim invasions of India beginning with Mohammad Ibn Kasem in 712 A D., there was a political background inasmuch as King Dahir of Sind had not been able to give a satisfactory explanation to Hajjaj, the Viceroy of Caliph, who had sent his ambassador to the Indian court, in regard to the group of Muslim girls travelling from Ceylon who had been attacked by the subjects of Dahir in the latter's territories. It could also be said in respect of Sultan Mahmud of Ghazni that though he argued in 1026 A.D. at the doorstep of the temple of Somnath that he was an idol breaker and hence not interested in the treasures offered by the Brahmans, it is recorded that the Sultan waged several wars against the believers in Central Asia which could only be justified on grounds of political expansion. It is the appreciation of Dr. Nazim that if Sultan Mahmud of Ghazni harassed the Hindu Rajas of India, he did not spare the Muslim sovereigns of Iran and Transoxiana. "The drama of plunder and bloodshed that was enacted in the sacred Ganges Doab was repeated with no less virulence on the slopes of the Mount Damawand and the banks of the river Oxus Religious considerations rarely carry weight with a conqueror, and the Sultan does not appear to have been influenced by them in his schemes of conquest."[5]

In theory and practice, religion gradually became a secondary consideration in the concept of *jehad* and war developed as an instrument of politico-religious policy.

5. Nazim, *The Life and Times of Sultan Mahmud of Ghazni* (1931), pp. 163-164.

CONCEPT OF WAR AND THE STATE PRACTICE IN MEDIAEVAL INDIA

Emperor Humayun is reported to have written to Sultan Bahadur Shah of Gujarat that there were five reasons for waging a war. In enumerating the lawful reasons which would permit warfare, Humayun quoted the authority of *Hafiz-Damishqi* and stated as follows:

"War is legitimate if it is fought to:—

(1) lay the foundation of a dynasty;

(2) protect the existing dynasty;

(3) defend against aggression;

(4) appeal for help from one state to another;

(5) as a love of conquest; but this is not a good cause for it may mean an unwarrantable attack or plunder.

But with me it is none of these. I have merely distributed money and collected men with the desire to make a holy war and to raise the standard of faith."[6]

Thus, according to Humayun himself, the mediaeval state practice admitted six reasons for legally resorting to warfare of which the best perhaps was a holy war and the most objectionable was war for the love of conquest. There can be no doubt that in mediaeval state practice war, being legally permissible, was freely resorted to:

(a) for the purpose of settling inter-state disputes;

(b) for the sake of conquering new lands to create a position of safety and security for the state; and

(c) in the name of Islam, for proselytisation and spread of the faith.

In the early days of the Sultanate, wars were perhaps fought with greater emphasis on religion but during the Mogul regime and particularly that of Emperor Akbar, wars constituted a necessary political weapon for imperialist expansion. As the holy

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6. *Arabic History of Gujarat*, Vol I, p. 231.

aspect attached to the concept of war has already been discussed while describing the doctrine of *jehad* it would be sufficient to add here that as the concept of the mediaeval state developed, political considerations became almost as important as the religious zeal to raise the banner of the faith in new lands.

Rules governing warfare

Though there were no written rules as such governing warfare, there was an unwritten code of conduct in certain respects which was observed both by the Islamic states of mediaeval India and the states of *Aryavarta*. These customary principles could possibly be classified under the following broad categories—

(i) Combatants and non-combatants;

(ii) Weapons of war;

(iii) Treatment of prisoners of war;

(iv) Enemy occupied territory; and

(v) Exchange of dead bodies of war victims.

(i) *Combatants and non-combatants*

Though the armed forces of the Sultanate and the Mogul Empire might have been a menace to the non-combatants who happened to come in the way while the army was marching from one camp to another, there is no doubt that the main weapons of war were meant for the pitched battle in which a combatant faced another combatant. Thus when actual fighting took place, the non-combatants were not attacked. This could perhaps be regarded as an accepted rule of warfare between the states of *Aryavarta inter se* and also in regard to pitched battles which were fought with and between Islamic states of mediaeval India. The state practice at the advent of Muslim rule in India may have been to terrorise the population after a war with a view to its subjugation but that constitutes another chapter in international law, *e.g.*, enemy occupied territory. On the whole, therefore, a war fought in mediaeval India generally recognised the distinction between combatants and non-combatants. The best example of a recognised non-combatant category that can

be had is that of a woman. Both Emperor Akbar and after him Sivaji were known never to molest women and children as well as priests and hermits even though belonging to the enemy camp. As far as the rule relating to immunity of monks and hermits is concerned, the authority of the *hedith* could be cited which is to the effect: "Do not kill people of the monasteries". Similarly, protection was granted to the blind and the insane by writers like Sarakhsi in *Kitab al Mabsut* (Cairo A.H. 1324, Vol. X, p. 69). However, if the aged and the monks indirectly assisted the war effort they were held liable to molestation. Though there was general agreement among jurists that women and children could not be slain, there were some sources that argued that if guilty of polytheism even the slaying of this protected category, both women and children, could be permitted. The followers of the *Kharaji* sect held this view whereas some *Hanafi* and *Shafi* jurists went to the extent of excluding from molestation peasants and merchantmen who took no part in fighting. Thus the concept of combatants and non-combatants which is so basic to the entire regulation of warfare was well developed in the middle ages and generally followed.

(ii) *Weapons of War*

There were no hard and fast rules on the kind of weapons permissible in warfare of the middle ages. There was no limitation as to the nature and quantum of force that could be used to overpower the enemy. Though the use of poison, such as on the arrows or on the sword, may have been despised as unchivalrous, there was no method of preventing the enemy from using it since the threat of retaliation in such cases could hardly serve as an effective sanction in those days. As far as the legal aspect is concerned, the use of poison was prohibited by the laws of Islam as well as those of *Aryavarta*. In Islamic legal theory use of poison was forbidden. There is proof of the fact that the *Maliki* jurist Khalil advised against the use of poisoned arrows. Moreover, Hilli has gone a step further in prohibiting the use of poison in any form during warfare. It would appear that Hilli in *Tabsirat al-Muta, allimin* (Damascus, A.H. 1342, p. 103) has been quite categorical in summarising the legal posi-

tion on this important aspect of the weapons permissible in war.

If a new weapon of war was invented, it could not be objected to by the other side merely on the ground that it was hyper-destructive in the context of the weapons which already existed. For example, when the use of artillery was made by Emperor Babur for the first time, the potency of artillery fire *vis-a-vis*, the weapons employed before the gun powder invention, was perhaps as great as that of atomic weapons in relation to the conventional TNT bombs. However, none of the States against whom Babur used artillery could or did protest on grounds of humanity or otherwise. In short, therefore, anything and everything that could be devised and used to defeat the enemy was permissible in mediaeval warfare. According to Islamic legal theory, as interpreted by the school of *al-Awzai* (774 A.D.) and *al-Thawri* (778 A.D.), there existed the doctrine of unnecessary destruction without qualifications. However, others restricted the doctrine on the basis of *Quranic* injunctions. For example, Malik, while dealing with the subject of laws of war in the *Muwatta*, prohibited the slaying of the flock and the destruction of beehives. Again, Ibn Hazm disapproved the slaying of animals except pigs.[7] On the other hand, Abu Hanifa observes that everything which the jehadists could not bring under control was open to destruction including houses, churches, trees, flocks and herds. As against this, Shafi contended that everything which is lifeless could be destroyed including trees. However, animals were to be destroyed only if they were to strengthen the enemy.[8] The rules concerning flocks and trees date back perhaps to the ancient Israelite practice. But, on the whole, if destruction was permitted, there were certain rules restricting, in some ways, the use of force in war.

However, use of fire to burn all inhabitants within a besieged town comprising even non-combatants such as traders and merchants was fully permitted. When laying siege to capture a fort, the method of throwing fire balls with a view to setting the enemy

7. Ibn Hazm, *al-Mahalli* (Cairo, A.H. 1349), Vol VII, p. 294.
8. Tabari, *Kitab al-Jihad*, ed. J. Schacht (Leiden, 1933), pp. 106-7.

camp on fire was common. As this is no place to describe and enumerate the various weapons of war, it would suffice to indicate that in the inter-state practice which governed warfare, there were no rules prohibiting the use of any particular arms as such.

(iii) *Treatment of Prisoners of War*

The state practice in regard to prisoners of war was not uniform. It differed somewhat depending upon whether it was an Islamic state or one of the states of *Aryavarta*. While the Islamic theory and practice permitted destruction of prisoners of war, the practice of the Rajput states, particularly, when dealing with the sovereigns or other dignitaries of the Islamic states, was to treat them with kindness giving them the respect which may be due to them on account of their position and even setting them free and thereby permitting them to return to their respective homes. A few cases illustrating the state practice in this regard would be worth mentioning after giving the salient features of the legal theory on the subject

Legal Theory

If *Quranic* authority is to be sought relating to the treatment of prisoners of war, it is possible to quote two *Quranic* injunctions which may be said to set out the law on the subject

> "It has not been for any prophet to have captives until he slaughters in the land." (*Quran* VIII, 68)

> "So, when ye meet in battle those who disbelieve, then let there be the striking off of heads until, when ye have slaughtered them, then make the bond strong Then grant either favor afterwards, or ransom, till war lays down its burdens." (*Quarn* XLVII, 4-5)

The actual treatment which was to be meted out to the prisoners of war, however, differed according to the various schools of law. The Imam was thus advised by the jurists to adopt one of the following four methods which he considered to be appropriate in the circumstances of the case:

Firstly, the Imam was advised by the jurists to arrange for the immediate execution of all the captives. The reason for such action was the need for weakening the enemy or serving the paramount Muslim interest. However, before prisoners were to be slaughtered, according to Awzai, they were to be given the opportunity of adopting Islam.[9]

Secondly, the Imam could release prisoners on their paying ransom or *fida*. In this connection, the authority of the *Quran* was quoted though the Caliph Aby Bakr always argued against the principle of ransom.[10]

Thirdly, the Imam could exchange the captives with the Muslim prisoners of war. The release of Muslim prisoners was almost a sacred duty and during the Abbasid period this practice became so common that it was often regulated by treaties.

Lastly, the Imam could condemn the prisoners as slaves. This remedy was specially prescribed for women and children prisoners who were not liable to be killed but could be enslaved and their property divided. The jurists agree on the immunity of women and children since the Prophet himself is reported to have warned against their annihilation.

The practice of taking prisoners of war is perhaps older than the birth of the state itself. It is on record that the Persians treated their captives with cruelty.[11] The Hebraic rule was perhaps as severe as the Persian state practice. The alternatives posed to the prisoners of war were threefold, *i.e.*, either Islam, or *jizia*, or death. Whatever may have been the theory, there can be little doubt that the mediaeval state practice as far as India is concerned varied considerably depending upon the temperament of the victorious monarch and the tradition of the ancient Rajput states which is described below.

State Practice

(a) When Sultan Timur invaded India in 1398 A.D., he

9. Tabari, *op. cit.*, pp. 41-42.
10. *Ibid.*, p. 145.
11. Thomas A. Walker, *History of the Law of Nations* (Cambridge, 1899), Vol. I, p. 61.

captured the city of Sarsuti where, according to *Tarikhi-i-Timuri*, "all the infidels were slain, their wives and children were made prisoners and their property and goods became property of the victors. Those infidels who did not embrace the faith were put to the sword."[12] When Timur reached the gates of Delhi, Sultan Mahmud gave battle to the invader at the palace of Jahannuma, where he was easily defeated by Timur. At this time there were about 100,000 prisoners in the camp of Timur and a contemporary chronicler records the position as follows:—

> "(It was reported by two *amirs* to Timur that) 'on the previous day, when the enemy's forces made the attack upon us, the prisoners made signs of rejoicing, uttered imprecations against us, and were ready, as soon as they heard of the enemy's success, to form themselves into a body, break their bonds, plunder our tents, and then to go and join the enemy, and so increase his numbers and strength.' Timur having asked their advice, 'they said that on the great day of battle these 100,000 prisoners could not be left with the baggage, and that it would be entirely opposed to the rules of war to set these idolators and foes of Islam at liberty. In fact, no other course remained but that of making them all food for the sword.' Timur thereupon resolved to put them all to death. He proclaimed 'throughout the camp that every man who had infidel prisoners was to put them to death, and whoever neglected to do so should himself be executed and his property given to the informer. When this order became known to the *ghazis* of Islam, they drew their swords and put their prisoners to death. 100,000 infidels, impious idolators, were on that day slain. Maulana Nasir-ud-din 'Umar, a counsellor and man of learning, who, in all his life, had never killed a sparrow, now, in execution of my order, slew with his sword fifteen idolatrous Hindus, who were his captives."[13]

It could perhaps be argued that the slaying of the prisoners of

12. *Tuzuk-i-Timuri* translated in HIED, Vol. III, pp. 420-427.
13. *Ibid.*, pp. 435-36.

war was justified on grounds of military necessity. However, if the action taken by Timur prior to this incident is any guide, the prisoners of war were subjected to the option of accepting the faith or being put to the sword.

(b) The fact that an important prisoner of war had to be slain even though wounded can be gathered from the incident relating to the defeat and death of Himu. In the battle of Panipat (5th November, 1556), Himu was defeated by the forces of Akbar commanded by Bairam Khan. It is known that Himu's army greatly outnumbered that of Akbar and Himu had almost won the battle when his eye was pierced by an arrow, seeing which his troops at once dispersed. Shah Quli Khan in the service of Bairam Khan, the guardian and general of Akbar, pursued Himu's elephant as Hawai, the driver, was endeavouring to carry his master beyond the reach of danger. Hawai begged Shah Quli not to slay wounded Himu, who was soon brought before Akbar. It is reported that Bairam Khan prayed Akbar to earn the title of *Ghazi* by slaying the infidel but the young Emperor merely touched Himu, who was slain by those in attendance.[14] Whatever may have been the facts, it is known beyond doubt that Himu who was a wounded prisoner was slain and the practice was regarded as justified.

(c) Another incident is reported by *Tabakat-i-Akbari* when Emperor Akbar besieged Sultan Bahadur in the fort of Mandu. The siege was carried on for some days till one night a party of the royal army scaled the walls and got into the fort. Sultan Bahadur was asleep when the alarm was raised. A general panic followed and the Gujaratis took to flight. Sultan Bahadur fled with 5 or 6 horsemen towards Gujarat and Sadr Khan and Sultan Alam Lodi threw themselves into the fort of Sungar. Next day they came out and were conducted to the presence of the Emperor. They were both wounded. Sadr Khan was placed in confinement and an order was given for cutting off the foot of Sultan Alam Lodi.[15] Abul Fazal, however, records

14. The *Journal of the Royal Asiatic Society*, 1867, p. 27; see also *The Cambridge History of India*, Vol. III, p 72.

15. *Tabakat i Akbari* See Eliot & Dowson, *The History of India As Told by Its Own Historians*, Vol. V, p. 192.

that Sadr Khan was treated with kindness but Sultan Alam had rebelled and hence the severe punishment.

(d) It is also on record that after the defeat of Sultan Bahadur, Jam Firoz, the ruler of Tatta who had given his daughter to Sultan Bahadur, fell a prisoner in the hands of the Emperor. However, the imperial guards, fearing that Jam Firoz might escape promptly, put him to death. Again, Sadr Khan who had surrendered himself at the fort of Sungar was also put to death on that night.[16] On the whole, however, state practice relating to treatment of prisoners of war was more humane in the reign of Akbar than ever before.

(e) *Tabakat-i-Akbari* mentions that when Akbar arrived at Fatehpur after his campaign in Gujarat, Masud Hussain Mirza along with 300 prisoners of war, was presented to the Mogul Emperor. "The eyes of Masud Hussain Mirza were sewed up, but the Emperor in his kindness ordered them to be opened. Several of the prisoners were liberated, but some, who had taken a leading part among the rebels, were kept in custody."[17] This indicates that the treatment of prisoners of war depended upon, (a) the kindness of the victorious monarch who in his discretion could liberate a prisoner of war as Akbar was known to have done on several occasions; and (b) the guilt of the prisoner concerned such as being the leader of the rebel movement, *etc.* Considerations of humanity did not appear to apply to the latter category.

(f) Another account of the treatment of a prisoner of war by Akbar is recorded by *Tabakat-i-Akbari* in the following words:

> "Gada Ali Badakshi and a servant of Khan-i-Kalan now brought in the wounded Muhammad Husain Mirza, a prisoner, each laying claim to the honour of capturing him. Raja Birbal asked him who made him prisoner, and he replied, 'Ingratitude to His Majesty,' and he spoke the truth His Majesty spoke a few kind words to him, and gave him into the custody of Rai Singh.

16 *Tabakati i Akbari* See Elliot & Dowson, *The History of India As Told by Its Own Historians*, Vol V, p. 191

17. *Ibid.*, p 359.

> Among the prisoners taken was a man named Mard Azmai Shah, who declared himself the Koka of Mirza Ibrahim Husain. His Majesty struck him to the earth with a spear, and the attendants cut him to pieces with their swords. It was afterwards found out that he had killed in the battle of Sarnal, Bhupat, brother of Raja Bhagwan Das."[18]

(g) Khan-Khanan, a great general of Emperor Akbar, after defeating Daud Khan of Orissa is said to have reported to the Emperor that "all the prisoners taken were put to the sword."[19]

(h) The practice of slaughter of prisoners of war is also confirmed by the battle of Panipat in 1761 A.D. The forces of Ahmad Shah Abdali did not hesitate in slaying the Maratha prisoners of war. This has been brought out at great length by the research of Dr. Shejwalkar. The following description given by him may be cited—

> "In the camp were probably one lakh and a half of non-combatants. Of these some 6,000 found their way to the non-hostile camp of Shuja-ud-Daulah and got a shelter there. They were protected from the fury of the Afghans and safely sent back to Jatwada after the return of Ahmad Shah to Delhi Some 22,000 persons were captured as slaves by the Afghans the next day. Of these a considerable number were women belonging either to the servant or concubine class with perhaps a few hundred of married women who had accompanied their husbands for pilgrimage. These were sold by their Afghan captors to Indian soldiers. Of the rest, possibly some 50,000 were slaughtered in cold blood by the Afghans on the day after the battle for religious merit. According to Kashiraj every Durrani soldier slaughtered a hundred or two in this way, which is obviously a gross exaggeration, because if we take even

18 *Tabakat i Akbari, op cit.*, p 367.

19. *Ibid*, p 387.

10,000 Durranis to have done this, it would bring the total slaughter to 10,00,000! Many persons who had foolishly returned to Panipat in the evening of the battle and taken shelter in the walled town, were the next day, hunted out and put to the sword by the hostile townsmen themselves. Bhau Bakhar reports a curious permission granted by Ahmad Shah to the sons of Mian Qutb Shah and Abdus Samad Khan who were beheaded by the Marathas at Kunjpura with ignominy. They sought permission to slaughter captured men to avenge their fathers' deaths. Ahmad Shah gave them the permit to go up to 20 kos and slaughter for four ghatikas only, but no more Thus permitted, Qutb Shah's sons slaughtered 4,000 fugitives near Sonepat and Samad Khan's son killed 5,000 near Bahadurgad to the west of Delhi. None of those who were captured alive at Panipat on the next day were slaughtered. Their property was looted but they were allowed to get themselves freed by paying a ransom. Shuja-ud-daulah and his Hindu officers like Anupgir Gosawi and Kashiraj paid the ransom for many and sent them back with a safe escort. Many of the fugitives possibly lost their lives because they would not part with what they possessed on their body. Only those who like Nana Fadnis threw away all property and assumed the dress of beggars were able to return unmolested, unless they were caught in the cold massacres related above."[20]

(i) The battle of Panipat (1761 A D.) furnishes yet another example of the slaying of an important prisoner of war, namely, Jankoji Rao Sindhia of Gwalior by the allies and generals of Ahmad Shah Abdali The contemporary account of Kashinath in this respect makes interesting reading apart from giving a picture of state practice regarding how envoys moved even during and after hostilities to get release of prisoners of war. Kashinath writes as follows:—

"I had an occasion to go to the tent of Barkhurdar

20. T S Shejwalkar, *Panipat. 1761*, pp. 100 101.

Khan and...his Diwan (Motilal) along with Meghraj the envoy of Najibud Dawlah and the second time I went alone. The above Diwan said: 'Have you come for the same negotiations or for something else?' I replied: 'I am ready for anything else too'. Motilal secretly took me to the tent; in one tent Raja Babu Pandit, the wounded envoy (of Jankoji Rao), was sitting and some words were exchanged with him (the above-mentioned). Then he took me to another tent, in which the wounded Jankoji Rao (Sindhia) was sitting. A saffron-coloured Burhanpuri Chherha was on his head and he had a drawer (shirt) of Gujarati silk-cum-cotton cloth on his body (feet). He had two wounds on his hands, one from a bullet and another from a spear. He had suspended his arm (in a sling) from his neck with a pech (fold) on his chherha. He was a handsome youth of about twenty years. On seeing me he lowered his head. I said: 'Rao Sahib, why are you so much in grief? You have carried out the duties of manliness so that for ages the mention of this record will remain on the pages of Time. There is however no escape from Destiny and fate' He replied: 'It would have been better if I had fallen on the field of battle, but this has happened according to the hand (of fate). Now they have asked me (for money). This is not so very difficult, but it is not possible here. You knew my father; there has been friendliness between my family and that of the Nawab. My father has served his father. If the Nawab at this time...shows sincere consideration for this unfortunate one, it would be fitting.' I said: 'The Nawab will not withhold this (help); how much is the demand?' Motilal replied: 'It appears that they want seven lacs of rupees, but is not confined to that amount and can be settled for more or less.' Taking leave of them, I came to the Nawab. Sitting on the same cushion (carpet) he and Najibud Dawlah were watching a dance. I conveyed all the circumstances. Najibud Dawlah was very penetrating in affairs and had a great curiosity for all information. This information

may have reached him too. He might have also received the information of the captivity of Jankoji. I knew that this gentleman had mortal enmity with the Sindhia family. I therefore did not relate the incident of Jankoji at that time and was sitting apart from the assembly. Najibud Dawlah said to the Nawab: 'It so appears from the countenance of so and so that he has to say something else, but has not said it, on account of my sitting here'. The Nawab said, "what difference is there between you and me?' He sent for me (Kashinath) and giving me an oath by the Ganges, asked me to tell the truth. I had no alternative but to tell him. As soon as Najibud Dawlah heard this, he, who was verily an Aristotle, appeared to be delighted and outwardly told the Nawab: 'Very well, men oblige others at such a time. The Nawab should settle this and whatever is decided, I shall pay the half thereof and the other half shall be paid by the Nawab'. Ostensibly saying these words, at the time of dispersal he got up from the presence of the Nawab and went to the Vazir (of Ahmad Shah). He described the whole incident to him. Since Najibud Dawlah desired the extinction of the race of the Sindhias and the Vazir was hostile to Barkhurdar Khan, he went to the Shah's presence and conveyed (the matter). The Shah sent for Barkhurdar Khan and enquired of him but he totally denied it. At that time he summoned me for evidence. Ultimately the Shah appointed the military provosts to make a search. Barkhurdar Khan sent word to his men that Jankoji be immediately killed and buried in such a place that his corpse can never be found. By the divine decree, this was the end of Jankoji."[21]

Rajput Practice

(a) The Rajput tradition in respect of treatment of prisoners of war was different inasmuch as it was perhaps based on the ancient Indian laws as propounded in the Code of Manu. Thus

21. Kashinath, *Account of the Battle of Panipat (1761)*, tr., p. 32.

when Maharana Kumbha captured the fort of Mandu and defeated Sultan Mahmud Khilji, he brought the Sultan as a captive with him to Chittor It is recorded by Vir Vinod as well as mentioned by Todd in his *Annals and Antiquities of Rajasthan* that Mahmud Khilji remained a prisoner in Chittor for a period of six months after which he was liberated without ransom by the magnanimous Maharana Kumbha Abul Fazal relates this victory and dilates on Kumbha's greatness This incident dates back to 1437 A D. and it appears that the practice of liberating prisoners of war was followed again in 1519 A D. when Maharana Sanga defeated Mahmud Khilji II, the King of Malwa, and took him as prisoner. Maharana Sanga like his predecessor Maharana Kumbha not only set at liberty the king of Malwa but loaded him with gifts and reinstated him on his throne.[22]

(b) Apart from the state practice of the Ranas of Chittor, there is an incident dating back to 1526 A D when Ibrahim Lodi, Sultan of Delhi, was defeated by Raja Ram Chand who made him a prisoner It is reported by *Tabakat-i-Akbari* that "The Raja showed him (Sultan Ibrahim) great honour and seated him upon the throne" Here Ibrahim remained until a party of the tribe of Mianas who dwelt near Raisin, invited him to be their ruler[23]

Practice of States in South India regarding Prisoners of War

The inter-state practice in South India regarding prisoners of war was not much different from what was prevalent among the states of North India The following incidents in South Indian history narrated by Nilakanta Sastri would appear to give the impression that plundering the country, killing women, children and Brahmanas was frequently resorted to by the victor:—

(i) "An inscription of Satyasraya from Hottur (Dharwar) dated Saka 9(2)9 A D 1007, states that the Nurmadi Cola Rajendra Vidyadhara, the son of

22. Briggs, *Farishta*, Vol IV, p 263; see also Harvilas Sarda, *Maharana Kumbha*, p 55

23. *Tabakat-i-Akbari*; see also Elliot & Dowson, *The Hsitory of India As Told by Its Own Historians*, Vol V, p. 244.

> Rajaraja Nityavinoda and the ornament of the Cola-kula, advanced as far as Donur in the Bijapur district, with an army of 900,000 troops, plundered the whole country, killed women, children and Brahmans, caught hold of girls and destroyed their caste. The same record proceeds further to say that Satyasraya, 'the slayer of the Tamil' (Tigula-mari), thereupon forced the Cola to turn back, captured his paraphernalia (vastu-vahana) and thus conquered the southern quarter. Though the account of wholesale slaughter and rape must be discounted as proceeding from a hostile source, still this account given by the Calukya inscription of Rajendra's invasion of Rattapadi rings very true, and may be accepted as substantially correct. Though overwhelmed for a time by the strength and rapidity of the Cola onslaught, Satyasraya soon recovered himself, and by hard fighting rolled back the tide of invasion. In Rattapadi proper there are no traces (as there are in Nulambapadi and Ganga-padi) of the occupation of the country by the Colas."[24]

(ii) Rajendra, the Great, also undertook the conquest of Ceylon in the fifth year of his reign, *i.e.*, 1017-18 A.D. The account of the invasion of Ceylon as gathered from inscriptions and plates is summarised below. We have an example here of one sovereign not only taking the defeated sovereign as prisoner of war but also mutilating the person of the relations of the sovereign.

> "The Karandai (Tanjore) plates (vv. 58-9) say that Rajendra conquered the king of Ceylon with a fierce army and seized his territory, his crown, his queen and her crown, his daughter, all his wealth, his transports, and the spotless garland of Indra and crown of the Pandya left in his charge; after having lost the battle, and being shorn of his queen, son and other belongings,

24. *The Colas* by K. A. Nilakanta Sastri, Madras University, 1955, p. 176.

the king of Ceylon, out of fear, came and sought the two feet of Rajendra as shelter. The Mahavamsa does not mince matters and gives a straight account which confirms the claims made by Rajendra in his inscriptions."[25]

A more detailed account of the occurrence during the Ceylon war is to be found in Cola inscriptions and from the viewpoint of possible inter-state practice rather than inter-state law, the following extract of these inscriptions is relevant:—

"With a single unequalled army (he) took the crown of Vikramabahu, the king of the people of Lanka on the tempestuous ocean. The King of Ceylon having been defeated on the battle-field and having lost his black elephant, had fled ignominiously; and who, when (the Cola king) seized his elder sister along with (his) wife and cut off the nose of (his) mother, had returned in order to remove the disgrace (caused) thereby, and, having fought hard with the sword, had withered in a hot battle."[26]

(iii) Another illustration of state practice in regard to women prisoners of war is to be found in the second war against Somesvara which was undertaken by Rajadhiraja between 1044 and 1046 A.D.:—

"The Manimangalam inscription of 3 December, A.D. 1046 gives a short account of this campaign stating that the Cola king defeated in battle several subordinate chieftains of the Calukya forces, and destroyed the palace of the Calukyas in the town of Kampili. Other inscriptions, of which the earliest is dated in the thirtieth year of Rajadhiraja, furnish some additional information about what followed the destruction of the palace at Kampili. Another engagement, said to be the third of its kind, followed at Pundur, described as a Kadakama-

25. *The Colas* by K. A. Nilakanta Sastri, Madras University, 1955, pp. 199.
26. *Ibid.*, pp. 248-249.

> nagar or cantonment city, on the left bank of the Krisna river, in which several Telugu chieftains, including the brothers of Telinga Viccaya, his mother and son, vassals of Somesvara, were made prisoners of war together with numberless women; thereupon, the city of Pundur was sacked by the Cola army and razed to the ground, its site being ploughed with asses and sowed with Varatikai, a kind of coarse millet."[27]

(iv) Again, in 1063-64 A.D., we have an account of the battle of Kudal-Sangamam fought during the reign of Rajendra's son called Rajendra-cola who assumed the title of Rajkesari Rajamahendra. The inscriptions of Virarajendra run to the following effect:—

> "(He) attacked and destroyed the irresistible, great and powerful army which he (*viz.*, Vikkalan) had again despatched into Vengai-nadu; fought the Madandanayakan Camunda-rajan and cut off his head; and severed the nose from the face of his (*viz.*, Camundaraja's) only daughter, called Nagalai (who was) the queen of Irugaiyan and who resembled a peacock in beauty."[28]

This cruel state practice could not be a lasting feature of inter-state relationship. It would appear that the practice based on cruelty was destined to arouse considerations of humanity at one time or the other. It was thus left to the wars fought between the Bahmani and the Vijayanagar kingdoms which brought humanitarian considerations to bear upon this problem and a treaty was concluded between Muhammad Shah and the Raja of Vijayanagar in 1367 A.D. of which a mention has already been made before. The details of the treaty need not be repeated here again though it may be emphasised that both Bahmani and Vijayanagar solemnly agreed not to slay their prisoners of war consequent upon frequent warfare in which they indulged. Muhammad Shah is reported to have taken an oath that he would not "hereafter put to death a single enemy after a vic-

27. *Ibid.*, pp. 253-54.

tory and would bind his successors to observe the same line of conduct."

Treatment of women as prisoners of war

Though the Islamic state believed in the destruction of prisoners of war as a general rule, it could be stated that in respect of women and children there are incidents which indicate that certain immunity was attached to their person. In this connection, the following incidents deserve a mention.

(a) After the battle of Panipat in 1526 A.D. when Sultan Ibrahim was killed along with Vikramajit, the ruler of Gwaliar, an incident occurred which finds a place in the romantic anecdotes of Indian history. "The wives and children of the Raja of Gwaliar who had been left in the fort of Agra were seized, while attempting to escape, by Humayun's men. Humayun, hearing of this, treated them with the utmost courtesy and protected them from their captors. In order to show their gratitude to the young prince, they presented him with jewels and precious stones; among these was a diamond of enormous value, which has been identified with the famous *Koh-i-Nur* now in the Tower of London."[28]

(b) Again, Sultan Sher Shah is reported to have treated Haji Begum, one of Emperor Humayun's wives, who had fallen into the Sultan's hands, with every mark of respect. It was immediately arranged to send her back to Agra with an escort and under a flag of truce.

(c) No account of the treatment of women prisoners of war would be complete without mentioning the incident relating to Adam Khan and Roopmati. In 1561, Emperor Akbar had sent one of his Generals named Adam Khan to conquer Malwa. Though Baaz Bahadur put up a brave defence, he was defeated and compelled to flee from Mandu. The imperial forces got possession of the entire fort including the large *harem* with Roopmati and other ladies maintained by Baaz Bahadur. Adam

28. *Ibid.*, p. 268.
29. *The Cambridge History of India*, Vol IV, p 13.

Khan sent a message to Roopmati and expected her to receive him and to look upon him as her lord in place of the defeated king of Malwa. Though Roopmati made every effort to escape, she found it impossible to do so. Thus at the appointed hour when Adam Khan entered the pavilion of Roopmati he saw her clad in magnificent robes and covered with lovely jewels. However, when he approached nearer, he found to his great dismay that the soul of Roopmati had departed. Akbar who heard of this news was roused to extreme anger at Adam Khan's violation of the laws of oriental warfare which demanded that a general capturing prisoners of war had to hand them over to the sovereign. The conduct of Adam Khan in disregarding this practice and in attacking the immunity of a woman prisoner made Akbar proceed to Malwa immediately. Adam Khan was made to surrender all the spoils of war to Akbar and when he returned to Agra he passed an imperial decree abolishing for all time the barbarous custom which had regarded the wives and families of defeated enemies as spoils of war. This decree was perhaps the outcome of the horror which the tragic fate of Roopmati had aroused in Akbar's mind.

(iv) *Enemy Occupied Territory*

There were no rules regulating the conduct of the conqueror in respect of treatment to be meted out in respect of persons and property in the enemy occupied territory. The conqueror was at liberty to capture the property and the inhabitants of the territory he had conquered. There were no restrictions placed either by law or by considerations of humanity in this regard because both political and military necessity compelled the conqueror to:—

(a) replenish his treasury by plundering the inhabitants of the conquered territory; and

(b) restore law and order and respect for his authority by ruthless suppression of the semblance of revolt. In this regard, it is known that terrorization of the conquered population was accepted as a method of compelling obedience.

There are, however, several deviations in this respect and those too were perhaps dictated by political considerations. Thus Babur when he conquered India, treated the local populace with great courtesy in order to win them over particularly when he was traversing hostile regions of Hindustan. Similarly, Emperor Akbar, when he indulged in political conquests, treated the inhabitants of the conquered territory with courtesy and kindness. The same perhaps could not be said of the earlier Sultans, particularly Alauddin Khilji, who were establishing authority for the first time and were, therefore, ruthless in their first administrative measures to lay the foundations of a dynasty.

(v) *Exchange of dead bodies of war victims*

The Muslim jurists advised respect for the dead bodies of the victims of war inasmuch as it was a declared improper practice of war to carry the heads of the enemies killed on the points of lances. Again, even if a *Harbi* was killed, his dead body was not to be mutilated or his head cut off and raised at the point of a lance. The opinion of several jurists on this point including Abu Yala is based on Muhammad's practice after the battle of Badr.[30] However, in the 18th century A.D., the Durranis refused to surrender the corpse of the killed enemy on the ground that the practice was to dry up the corpse and take it to the country of the victor. This relates to the incident following the battle of Panipat fought between the Marathas and Ahmad Shah Abdali in 1761 A.D. when the Marathas asked for the return of the corpse of Biswas Rao, one of their leaders and their request was rejected by Ahmad Shah Abdali. The details of this incident have been mentioned before.[31] It would suffice to emphasize here that the Muslim generals who hailed from India and were assisting Ahmad Shah Abdali brought pressure on the latter to respect the Indian customary practice which would bring him good name whereas any action to the contrary would be the cause of grave infamy. It appears that Ahmad Shah Abdali

30. Abu Yala, *Kitab al Ahkam*, edited by Al Fiqqi (Cairo, 1938).
31. This incident has also been mentioned earlier when dealing with the laws of Islam in relation to the laws of *Aryavarta*. See p. 98.

accepted the advice of Nawab Shuja-ud-daulah who rightly pleaded that, "The hostile relationship extends up to the limit of life and the customs of India are that after the victory the corpse of the chief of every tribe is buried and shrouded according to their mode and usage." The aforesaid may be said to summarise the law on the subject which came to be accepted by belligerents professing different faiths.

BIBLIOGRAPHY

ANCIENT INDIA

Aiyangar, K. V. Rangaswami, *Aspects of the Social and Public Systems of Manusmrti.*

Altekar, *State and Government in Ancient India.*

Bandophadhyaya, *International Law and Custom in Ancient India.*

Beni Prasad, *The State in Ancient India.*

Bevan, *The House of Selcukos*

Dikshitar, *War in Ancient India*

Elliot and Dowson, *A History of India as Told by Its Own Historians.*

Havell, E B., *A Short History of India*

Hiralal Chatterjee, *International Law and Inter State Relations in Ancient India.*

Indian Journal of International Law, Vol. I, Nos 2 & 3.

Indian Year Book of International Affairs, Vol VI, 1957 and Vol. VIII, 1958.

Kama Sutra.

Kamandakiyanitisara.

Kane, P. V., *History of Dharmasastra*

Kautilya's Arthasastra.

Kullukbhatta, *Commentary on Manu*

Law, N. N, *International Relations in Ancient India.*

Majid Khadduri, *War and Peace in the Law of Islam*

Manusmrti.

Megasthenes, *Fragments.*

Monier-Williams, *Sanskrit-English Dictionary.*

Mukherji, R. K., *Chandragupta Maurya and His Times.*

Narada Smrti.

Narasu, *The Essence of Buddhism.*

Oppenheim, *International Law,* Vol. I, 7th Ed. (1948), and Vol. II, 7th Ed. (1952).

Recueil Des Cours, 1958, Vol. I.

Rhys Davids, *Buddhist India* (1911).

Satapath Brahman.

Shama Shastri, *Arthasastra.*

Sukraniti.

Swell, *Forgotten Empire.*

The Cambridge History of India, Vol. I.

The Classics of International Law, 1933.

Vincent Smith, *Ashoka, the Buddhist Emperor of India.*

Vincent Smith, *Early History of India.*

Yajnavalkya Smiti.

MEDIAEVAL INDIA

Abbe Renaudot, *Anciennes Relations des Indes et de la Chine de deux voyageurs Mahometans qui y allerent dons le ixe siecle de notre ere* (published in 1718).

Abdul Rahim, *Jurisprudence*, 1911.

Abu Da'ud, *Sunan.*

Abu Yala, *Kitab-al Ahkam*, edited by Al Fiqqi (Cairo, 1938).

Abul Fazl, *Akbar Nama.*

Al-'Utbi, *Tarikh-i-Yamini.*

Arabic History of Gujarat, Vol. I.

Arnold, T. W., *The Preaching of Islam.*

Ayyar, K. V. Krishna, *The Zamorins of Calicut.*

Bailey's History of Gujarat.

Basatin-us-Salatin.

Bibliotheca Indica, The Tabakat-i-Nasiri.

Briggs, *Farishta.*

Chach-Nama.

Danvers, *The Portuguese in India.*

Darr, Mohammad Abd Alla, *The Origin of Islam.*

Elliot and Dowson, *History of India as Told by Its Own Historians*

Faridi, Fazlullah Lutfullah, *Mirat-e-Sikandari or The Mirror of Sikander, by Sikander, the son of Muhammad alias Manjhu* (Gujarati translation).

Fitzgerald, S. G. Vesey, *The alleged debt of Islam to Roman Law*, 11 *Law Quarterly Review.*

Futuhat-i-Adilshashi.

Hakluyt Society, *Hawkin's Voyage.*

Hakluyt Society, *The Embassy of Sir Thomas Roe*, 2nd ed.

Havell, E B, *History of Aryan Rule in India*

Hilli, *Al Babu'l Hadi Ashar*, translated by W Miller (London, 1928).

Ibn Hasan, *The Central Structure of The Mughal Empire.*

Ibn Hazm, *al-Mahalli* (Cairo, A. H. 1349), Vol VII.

Ibn Hazm, *'Kitab al-Fazl, fial Milalwa' l-Ahwal wa'l-Nihal'*, (Cairo, H H. 1321), Vol. IV

Ibn Sa'd, *Kitab al Tabaqat al Kabir, ed* Sachau (Leiden, 1917), Part II, Vol II.

Idris, Sha'fi Abu Abd Allah, *Kitab al-Umm*, Vol. I.

Ishwari Prasad, *A Short History of Muslim Rule in India*, 1st Ed.

Kashinath, *Account of the Battle of Panipat* (1761).

Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Law*, 1931

Majid Khadduri, *War and Peace in the Law of Islam.*

Majumdar, A. K, *The Chalukyas of Gujarat.*

Majumdar, R. C, *Delhi Sultanate.*

Malik, *Al Muwatta.*

Memoirs of Zahiruddin Muhammad Babur (translated by J. Leyden, William, Erskine and Sir Lucas King), 1921.

Muhammad Ali, *Religion of Islam.*

Muhammad Nazim, *The Life and Times of Sultan Mahmud of Ghazna*, 1931.

Pant, *The Commercial Policy of the Moghuls.*

Quduri, *al Mukhtasar* (Istanbul Att 1309).

Richard Bell, *Quran.*

Robert Ward, *Foundation and History of the Law of Nations.*

Saksena, Banarsi Prasad, *History of Shah Jahan of Delhi.*

Sarda, Har Vilas, *Maharana Kumbha*

Sastri, K. A. Nilakanta Sastri, *The Colas*, University of Madras, 1955.

Shejwalkar, T. S, *Panipat: 1761.*

Tabakat-i-Akbari.

Tabari, *Kitab al-Jihad*, ed. J Schacht (Leiden, 1933).

Tavernier, *Travels in India.*

The Cambridge History of India, Volumes III, IV and V.

The Classics of International Law (1933), *De Jure Belli Libri Tres*, Vol. II.

The Classics of International Law (1936), *Le Droit des Gens*, Vol. III.

The Journal of the Royal Asiatic Society, 1867.

Thomas, *Prinsep Useful Tables.*

Tod, *Travels*, Vol. I.

Tod, *Annals and Antiquities of Rajasthan*, Vol. III.

Tuzuk-i-Timuri translated in HIED, Vol. III.

United Nations Conference on International Organisation, Documents, Vol. XIV.

Vir Vinod (in Hindi) available in the archives of the Maharana of Mewar.

Walker, Thomas A., *History of the Law of Nations* (Cambridge, 1899), Vol. I.

Williams, L. F. Rushbrook, *An Empire Builder of the Sixteenth Century* (1918).

INDEX